(28)

No. 03-6696 Status: ARGUED

Title: Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi, Petitioners

v.

Donald H. Rumsfeld, Secretary of Defense, et al.

Docketed: October 2, 2003
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (02-7338)
Decision Date: January 8, 2003
Rehearing Denied: July 9, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 1 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 3, 2003)
Oct 3 2003	Brief amicus curiae of Fred Korematsu filed. VIDED.
Oct 3 2003	Brief amici curiae of John J. Gibbons, et al. filed. VIDED.
Oct 29 2003	Order extending time to file response to petition to and including December 3, 2003.
Dec 3 2003	Brief of respondents Donald Rumsfeld, Secretary of Defense, et al. in opposition filed.
Dec 3 2003	Nine copies of Joint Appendix filed in the Court of Appeals received from counsel for respondents.
Dec 3 2003	Brief amici curiae of Former Prisoners of War, et al. filed.
Dec 17 2003	Reply of petitioners Yaser E. Hamdi and Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi filed.
Dec 18 2003	DISTRIBUTED for Conference of January 9, 2004.
Jan 5 2004	Supplemental brief of petitioners Yaser E. Hamdi and Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi filed. (Distributed)
Jan 7 2004	Supplemental brief of respondents Donald Rumsfeld, Secretary of Defense, et al. filed. (Distributed)
Jan 9 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 20 2004	Brief amici curiae of American Civil Liberties Union, et al. filed.
Feb 23 2004	Brief amici curiae of International Humanitarian Organizations and Associations of International Journalists filed.
Feb 23 2004	Brief amici curiae of International Law Professors filed.
Feb 23 2004	Brief amicus curiae of American Bar Association filed.
Feb 23 2004	Brief amicus curiae of Global Rights filed.
Feb 23 2004	Brief amicus curiae of Cato Institute filed.
Feb 23 2004	Joint appendix filed. (Joint appendix in two volumes).
Feb 23 2004	Brief amicus curiae of Experts on the Law of War filed.
Feb 23 2004	Brief amici curiae of Nathaniel R. Jones, et al. filed.
Feb 23 2004	Brief amici curiae of Certain Former Prisoners of War filed.
Feb 23 2004	Brief of petitioner Yaser E. Hamdi and Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi filed.
Feb 23 2004	Brief amicus curiae of Charles B. Gittings, Jr. filed. (Distributed)

Mar 2 2004	SET FOR ARGUMENT WEDNESDAY, APRIL 28, 2004.
Mar 12 2004	Record received from U.S.C.A. 4th Circuit. (1 box)
Mar 15 2004	Record received from U.S. District Court for Eastern District of Virginia. (1 envelope)
Mar 17 2004	Brief amici curiae of John Cornyn and Larry Craig filed. VIDED.
Mar 23 2004	CIRCULATED.
Mar 24 2004	Brief amicus curiae of American Center for Law & Justice filed. (Distributed).
Mar 24 2004	Brief amici curiae of Washington Legal Foundation, et al. filed. (Distributed)
Mar 25 2004	Brief amici curiae of Center for American Unity, et al. filed. (Distributed)
Mar 29 2004	Brief of respondents Donald Rumsfeld, Secretary of Defense, et al. filed. (Distributed)
Mar 29 2004	Brief amicus curiae of Eagle Forum Education and Legal Defense Fund filed. (Distributed)
Mar 29 2004	Brief amicus curiae of Common Defence filed. (Distributed)
Mar 29 2004	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. (Distributed)
Apr 20 2004	Reply of petitioners Yaser E. Hamdi and Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi filed. (Distributed).
Apr 28 2004	Argued. For petitioners: Frank W. Dunham, Jr., Federal Public Defender, Alexandria, Va. For respondents: Paul D. Clement, Deputy Solicitor General, Department of Justice, Washington, D.C.

03-6597 (16)

Supreme Court, U.S.
FILED
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No. 03-_____

IN THE

SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANK W. DUNHAM, JR.
Federal Public Defender
Eastern District of Virginia
Counsel of Record
GEREMY C. KAMENS
Assistant Federal Public Defender
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

(9)

QUESTIONS PRESENTED

1. Does the Constitution permit Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an "enemy combatant"?

2. Is the indefinite detention of an American citizen seized abroad but held in the United States solely on the assertion of Executive officials that he is an "enemy combatant" permissible under applicable congressional statutes and treaty provisions?

3. In a habeas corpus proceeding challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant," does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification of the detention?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Fourth Circuit:

Yaser Esam Hamdi and Esam Fouad Hamdi, as next friend, were the appellees below. Donald Rumsfeld, United States Secretary of Defense, and W.R. Paulette, Commander of the Norfolk Naval Brig, were appellants below.

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YASER ESAM HAMDI; ESAM FOUAD HAMDI,
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Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-28a) is reported at 316 F.3d 450 (4th Cir. 2003). The opinion of the district court (App. 29a-38a) is reported at 243 F. Supp. 2d 527 (E.D. Va. 2002). The denial of the petition for rehearing (App. 39a-67a) is reported at 337 F.3d 335 (4th Cir. 2003).

Earlier opinions in this proceeding are reported at 296 F.3d 278 (4th Cir. 2002), and 294 F.3d 598 (4th Cir. 2002).

JURISDICTION

The Court of Appeals' judgment was entered on January 8, 2003. By a vote of eight to four, the full court denied a petition for rehearing on July 9, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Suspension Clause of Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. Section 8, Clause 11 of Article I provides that Congress possesses the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

3. Section 2, Clause 1 of Article II provides in pertinent part: "The President shall be Commander in Chief of the Army and Navy of the United States . . . ."

4. The Fifth Amendment to the Constitution provides in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

5. 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

6. 28 U.S.C. § 2241 provides for the issuance of the writ of habeas corpus if a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."

7. 28 U.S.C. § 2243 authorizes habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material facts," and provides that courts "shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

8. 28 U.S.C. § 2246 provides that "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition . . . ."

STATEMENT OF THE CASE

This case involves the indefinite and virtually incommunicado[1] detention of an American citizen, Yaser Esam Hamdi ("Petitioner" or "Hamdi"), by the military based on its assertion that he is an "enemy combatant"—a soldier affiliated with the Taliban, the former government of Afghanistan. To date, Hamdi has been detained for almost two years without access to counsel or to any court, military or civilian. Since April 2002, he has been held in a U.S. Navy jail in the United States.[2]

The Court of Appeals for the Fourth Circuit ruled that the military's indefinite detention of Hamdi was not only lawful but also virtually immune from factual inquiry by the judiciary, in large measure because of the location—"a zone of active combat" in Afghanistan—where Hamdi was purportedly seized. By a vote of eight to four, and over dissenting opinions of Judges Luttig and Motz, the *en banc* court declined to rehear this decision.

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[1] Hamdi has been forbidden any contact with the outside world with the exception of a visit by a representative of the International Red Cross and the delivery of infrequent letters to his family.

[2] Recent news reports suggest that Hamdi has been moved from a Navy brig in Norfolk, Virginia, to a brig located in Charleston, South Carolina. *U.S. Man Caught With Taliban Is Moved to Brig*, L.A. Times, Aug. 24, 2003, at 16; *cf.* Fed. R. App. P. 23(a); Sup. Ct. R. 36(1).

This case presents fundamental questions about the right of American citizens to be free from indefinite detention by the government without charge or trial, the power of the Executive branch to abbreviate due process of law during wartime, and the role of the federal courts in resolving these issues. The appropriate balance between the rights of citizens and the Executive power to defend against threats to national security is an old question, *see, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and one that was answered by the Fourth Circuit in a fundamentally alarming way.

By refusing to permit judicial review of the facts related to the seizure of an American citizen, the lower court not only embraced an unchecked Executive power to indefinitely detain American citizens suspected of being affiliated with enemies, but it also abandoned procedural safeguards designed to promote truth and fairness. *Cf. Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("This system is premised on the well-tested principle that truth — as well as fairness — is 'best discovered by powerful statements on both sides of the question.'") (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984)). Once the Executive branch asserts that a person is an enemy combatant, the Fourth Circuit ruled, no factual testing of that determination is allowed.

The Fourth Circuit's opinion cannot be squared with this Court's rulings regarding the scope of judicial review of military seizures and the rights of detainees

to obtain access to the courts. Nor is the Fourth Circuit's ruling consonant with constitutional and congressional prohibitions against the unbridled detention of citizens by the Executive branch. For these important reasons, this Court should accept review of Petitioner's case.

I. Factual Background

Petitioner is an American citizen who resided in Afghanistan in the Fall of 2001. Petitioner was apparently seized by Northern Alliance forces and turned over to the U.S. military during that time, and has been in U.S. custody ever since—a period fast approaching two years. From April 2002 until recently, Hamdi was imprisoned in a naval brig in Norfolk, Virginia. Counsel has not been permitted access to Petitioner, and Petitioner has not been permitted to appear in court or otherwise participate in these proceedings. Petitioner may not even be aware of the existence of the litigation bearing his name.

In support of Petitioner's detention, the government submitted a two-page, nine-paragraph declaration by Michael Mobbs, a special advisor to the Under Secretary of Defense for Policy. (J.A. 61.)[3] Mobbs asserts that Petitioner traveled to Afghanistan in July or August of 2001.[4] Mobbs further asserts that Petitioner

[3] Citations to "(J.A.)" refer to the Joint Appendix in the Court of Appeals. Citations to "(App.)" refer to the appendices attached to this petition.

[4] The Mobbs declaration is based entirely on hearsay. Mobbs has no first-hand knowledge of any of the facts contained in the declaration. (J.A. 61, ¶ 2.)

"affiliated" with a Taliban military unit prior to the September 11 attacks on the United States. Petitioner allegedly remained with that unit after the September 11 attacks and after October 7, 2001, when the United States began military operations against the Taliban. (J.A. 61, ¶ 3.)

Mobbs alleges that on an unspecified date in late 2001, Northern Alliance forces were engaged in battle with the Taliban. Mobbs also asserts that Petitioner possessed a rifle and that the unit with which he was affiliated surrendered to Northern Alliance forces. Mobbs does not say where or when this occurred or what Petitioner was doing at the time of his capture.

While under the control of Northern Alliance forces, Petitioner was interviewed by a U.S. interrogation team. (J.A. 61, ¶ 5.) According to Mobbs, Petitioner identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban." *Id.* Mobbs does not assert that Petitioner was a member of al-Qaeda.

The Mobbs declaration then says that U.S. military screening teams determined that Petitioner met the criteria for enemy combatants over whom the U.S. was taking control, and that he also met the criteria for transfer to Guantanamo Bay, Cuba. (J.A. 62, ¶¶ 7, 8.) Mobbs does not set forth what those criteria were or explain why Hamdi met them. The declaration finally asserts that a "subsequent interview of Hamdi

confirmed that he surrendered and gave his firearm to Northern Alliance Forces which supports his classification as an enemy combatant."

II. Proceedings Below

A. Initial Proceedings in the District Court

This litigation began on May 10, 2002, when the Federal Public Defender, endeavoring to act as next friend, filed a habeas corpus petition pursuant to 28 U.S.C. § 2241 challenging Defense Secretary Donald Rumsfeld and Commander W.R. Paulette's ("Respondents") detention of Yaser Esam Hamdi. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) (*Hamdi I*).[5] After several hearings, the district court ordered Respondents to permit counsel to have access to Petitioner.[6]

B. Interlocutory Appeals Related to "Next Friend" Standing and Access to Counsel

Respondents immediately appealed the access order to the Fourth Circuit, which entered a stay on May 31, 2002. *Hamdi I*, 294 F.3d at 602. On June 26, 2003, the court dismissed the petition in *Hamdi I*, holding that the Federal Public Defender

[5] All of the lower courts that have considered this case have appointed the Federal Public Defender to represent Hamdi. The Federal Public Defender initially believed that Hamdi, like John Walker Lindh, had been brought to the United States for prosecution. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[6] A federal magistrate judge first ordered Respondents to grant counsel's request for access to Hamdi. (J.A. 202.) Respondents then appealed the magistrate judge's access order to the district court. After another full hearing on the issue of access (J.A. 207-56), the district court likewise ordered Respondents to provide counsel immediate access to Hamdi. (J.A. 257.)

did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d at 603-07.

On June 11, 2002, while the appeal in *Hamdi I* remained pending, a separate habeas petition was filed by Hamdi's father acting as next friend, *id.* at 600 n.1, and the district court consolidated that petition with the petition in *Hamdi I*. (J.A. 30-33.) Two full hearings having already been held on the issue of counsel's access to Hamdi in *Hamdi I*, the district court, without further hearing, again ordered Respondents to allow counsel to have access to Hamdi. *Id.*

Respondents appealed this order, and obtained a second stay from the Fourth Circuit. (J.A. 3, 148.) The Fourth Circuit then reversed, finding that the district court ordered access to Hamdi "without adequately considering [its] implications . . . and before allowing the United States to respond [to the newly filed petition by Hamdi's father]." *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*). The court remanded the case to the district court and directed it to design appropriate procedures that would govern the inquiry into the propriety of Hamdi's detention. *Id.* at 283-84. In a subsequent order dissolving the stay and directing the immediate issuance of the mandate, however, the Court of Appeals instructed the district court that the sufficiency of the Mobbs declaration must be considered first as "an independent matter" before the district court considered any other questions in the case. (J.A. 149.)

C. Ruling on the Sufficiency of the Mobbs Declaration and Subsequent Interlocutory Appeal

On August 13, 2002, in accordance with the Fourth Circuit's instruction, the district court conducted a hearing to consider whether the Mobbs declaration, "standing alone," provided a sufficient factual basis for purposes of meaningful judicial review. (J.A. 326-27.)[7] On August 16, 2002, the district court issued an order finding that the Mobbs declaration, by itself, did not permit meaningful judicial review of Petitioner's detention. (App. 29a-38a.) The district court arrived at this conclusion at least in part because information in the declaration was drawn from hearsay supplied by the Northern Alliance, a loose coalition led by what the court characterized as feudal "warlords." (J.A. 390, 394); (App. 36a.)[8] Instead of ordering access to Petitioner, however, the district court thereafter ordered production of additional documentary information. (App. 38a.) Respondents obtained certification

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[7] At the hearing, the district court exhibited extraordinary deference to the Executive by offering to allow Respondents to conduct a military tribunal to determine Hamdi's status as a detainee in accordance with applicable military regulations for treatment of prisoners. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) ("EPW Regulations") (J.A. 91-126). Respondents rejected this invitation. (J.A. 405-06.)

[8] The district court's concern in this regard was well-founded. *See* Jan McGirk, *Fighting Terror*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

of that order and the Fourth Circuit panel authorized interlocutory review pursuant to 28 U.S.C. § 1292(b).

On January 8, 2003, the Fourth Circuit panel reversed the district court's August 16, 2002, order, and ruled not only that the Mobbs declaration was sufficient, without more, to sustain Hamdi's detention, but also that Hamdi's petition should be dismissed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*) (App. 1a-28a.) Specifically, the panel found that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." (App. 10a.) In short, the Fourth Circuit ruled that when the Executive branch asserts that it has seized an American citizen in a zone of active combat and also asserts that the citizen is an enemy combatant, that citizen may not challenge or otherwise dispute those assertions. In fact, the citizen may be indefinitely incarcerated even though the assertions were made by an official who has no personal knowledge of the underlying facts.

Petitioner sought rehearing and rehearing en banc. By eight to four, and over dissenting opinions of Judges Luttig and Motz, the court denied rehearing. *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (*Hamdi IV*) (App. 39a-67a.) Judge Luttig would have granted rehearing because the panel erroneously characterized the

location of Hamdi's seizure as "undisputed" and then relied upon that fact as critical to its decision. (App. 54a (Luttig, J., dissenting from denial of rehearing).) Circumstances related to Hamdi's seizure, Judge Luttig explained, cannot be characterized as "conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." (*Id.*)

Agreeing with Judge Luttig that the panel's characterization "collapses entirely upon examination," (App. 63a), Judge Motz also reasoned that the panel permitted "appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of individual freedoms guaranteed all citizens." (App. 61a (Motz, J., dissenting from denial of rehearing).) The Fourth Circuit's ruling, Judge Motz observed, "marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation." (App. 62a.) "Neither the Constitution nor controlling precedent," Judge Motz wrote, "sanction this holding." (*Id.*)

REASONS FOR GRANTING THE PETITION

This case presents the question whether the Executive branch may indefinitely detain an American citizen purportedly seized in a zone of armed combat and

declared to be an "enemy combatant" without providing any opportunity for the citizen to meet with counsel, challenge the military's allegations, or otherwise be heard in a federal habeas corpus proceeding. Petitioner seeks review because the judgment below: (1) involves issues of fundamental national importance; (2) conflicts with this Court's decisions authorizing judicial review of military seizures during wartime and protecting the right of detainees to court access; and (3) works a radical change in the balance between the three branches of government by condoning an open-ended Executive power to imprison American citizens at the expense of constitutionally protected liberties and congressional authority.

"The power of the executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgment of his peers," Winston Churchill said, "is in the highest degree odious, and is the foundation of all totalitarian government . . . ." A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 Loy. L. Rev. 629, 631 (1996). In fact, the Court of Appeals' recognition of a novel Executive power to indefinitely detain American citizens and disregard fundamental constitutional rights based almost entirely upon the purported location of seizure is flatly contrary to this Court's decisions upholding the rights of citizens against military authority even in areas of alleged armed conflict. Moreover, the Fourth Circuit's ruling violates the Suspension Clause and fails to protect the basic elements

of process due under the Fifth Amendment to the Constitution. Finally, Congress has prohibited the indefinite detention of an American citizen in the absence of explicit statutory authority. For these reasons, it is profoundly important for this Court to resolve the questions posed by Hamdi's case.[9]

I. This Case Presents Issues of Fundamental Importance

At stake is the indefinite detention of an American citizen held by the military without charge for almost two years. As Judge Luttig noted, however, this case "has implications beyond the particular dispute." (App 54a.) The lawfulness of Hamdi's indefinite imprisonment turns on "the boundaries between military and civilian power," *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946), and presents questions

[9] A petition for habeas corpus filed by another American citizen designated as an "enemy combatant," Jose Padilla, is pending review in the Court of Appeals for the Second Circuit. No. 03-2235(L). Because the Executive branch has imprisoned Mr. Padilla in South Carolina, it contends that jurisdiction is not proper in the Second Circuit. *See Padilla v. Rumsfeld*, 256 F. Supp. 2d 218, 222 (S.D.N.Y. 2003) (granting application for certification under 28 U.S.C. § 1292(b)). Oral argument apparently will take place the week of November 17, 2003.

The government evidently has erected a special facility designed to hold citizens designated as "enemy combatants" in South Carolina. Jess Bravin, *More Terror Suspects May Sit in Limbo*, Wall St. J., Aug. 8, 2002, at A4 (J.A. 320-22). Consequently, apart from the *Padilla* case pending in the Second Circuit, the questions raised by this case may never be addressed by another court of appeals. *See, e.g, Al-Marri v. Bush*, No. 03-1220, 2003 WL 21789542, at *7 (C.D. Ill. Aug. 1, 2003) (dismissing for lack of venue habeas petition filed on behalf of person declared "enemy combatant" after criminal charges were dismissed and petitioner was moved to South Carolina). Like Padilla and al-Marri, Hamdi reportedly has been moved to the same facility in South Carolina. *See supra* note 2.

integral to our constitutional design rarely equaled in national importance. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-19 (1866) ("No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people."). It is not surprising, then, that judges of the Fourth Circuit described this case as "momentous," (App. 48a (Traxler, J., concurring in denial of rehearing)), acknowledged the"overarching importance" of the issues of law, (App. 60a (Luttig, J.)), and characterized the ruling below as "breathtaking," "unprecedented," "extraordinary," and "chilling." (App. 63a, 64a (Motz, J.)).[10]

The upshot of the Fourth Circuit's ruling is that the separation of powers precludes substantial judicial inquiry into the indefinite detention of a citizen asserted to be an "enemy combatant" by the Executive branch and allegedly seized within an area asserted to be a "zone of active combat." What constitutes a "zone of active combat," and who may be designated as an "enemy combatant," were left by the Fourth Circuit to the discretion of the Executive branch. Indeed, the appellate court not only left both terms undefined, it also refused to allow Petitioner a voice as to

[10] The indefinite detention of so-called "enemy combatants" also has generated an expanding volume of commentary. *See, e.g., U.S. Nationals Detained as Unlawful Combatants*, 97 Am. J. Int'l L. 196 (2003); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. Jrnl. 503 (2003); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 Yale L.J. 961 (2003).

where he was seized or what he was doing at the time. The Fourth Circuit thus imposed virtually no restriction on the Executive branch's power to indefinitely imprison citizens without charge and without access to counsel or the courts.

1. According to the Fourth Circuit, "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant" would violate the separation of powers. (App. 25a.) For this reason, the judicial review endorsed by the Fourth Circuit "actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated [Hamdi] as an enemy combatant." (App. 55a (Luttig, J.).) The Fourth Circuit's refusal to engage in this inquiry is, as both Judge Luttig and Judge Motz recognized, irreconcilable with its promise to provide "meaningful judicial review." (App. 55a (Luttig, J.), 65a (Motz, J.).)

More ominously, Judge Motz perceptively warned that an Executive power to designate citizens as "enemy combatants" that is unhinged from judicial review "threatens the freedoms we all cherish." (App. 67a.) Because the Fourth Circuit's opinion denies any ground for judicial inquiry into the Executive's designation of a citizen as an enemy combatant, Judge Motz explained, the decision sanctions indefinite detention on the basis of "no credible evidence supporting the Executive's designation [of a citizen] as an enemy combatant." (App. 65a.)

2. The significance ascribed by the Fourth Circuit to the purported location of Hamdi's seizure offers little protection against the exercise of this unchecked power.

As the Fourth Circuit put it, the "political branches are best positioned to comprehend this global war in its full context, . . . and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches." (App. 15a.) Accordingly, as Judge Motz pointed out and Judge Traxler conceded, the Fourth Circuit's opinion suggests that the definition of a "zone of active combat" is effectively non-justiciable. (App. 64a n.3 (Motz, J.), 50a (Traxler, J.).)

Left to the Executive branch, the outlines of a "zone of active combat" in the "war on terrorism" are without limit. Indeed, the Executive branch has never been conservative about designating territory to be within the theater of armed conflict. *Cf. Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 239, 274-76 (1960) (military bases in foreign countries); *Duncan*, 327 U.S. at 311 (Territory of Hawaii); *Korematsu v. United States*, 323 U.S. 214, 220, 223 (1944) (western United States); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 126 (Indiana). And the present "war on terrorism," to be sure, is even less constrained than prior conflicts by national borders or traditional definitions of combat.[11] Moreover, outside the context of military

[11] "The war on terrorism is a global campaign against a global adversary . . . . The war on terrorism began in Afghanistan . . . but it will not end there. It will not end until terrorist networks have been rooted out, wherever they exist." *Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan*, Washington, D.C., July 31, 2002, *at* http://www.defenselink.mil/speeches/2002/s20020731-secdef.html.

operations, and within the United States, the Executive branch has employed the threat of "enemy combatant" designation to secure guilty pleas in criminal cases. *See, e.g.*, Michael Powell, *No Choice but Guilty; Lackawanna Case Highlights Legal Tilt*, Wash. Post, July 29, 2003, at A01; Eric Lichtblau, *Threats and Responses*, N.Y. Times, June 20, 2003, at A1.

3. The Fourth Circuit also refused to permit Petitioner to speak to counsel with regard to the location of his seizure, much less to any other issue. Petitioner therefore "has never been given the opportunity to dispute any facts," (App. 63a (Motz, J.)), including the Executive branch's assertion that he was seized within a zone of active combat. Because the Fourth Circuit allowed the Executive branch to define what constitutes a "zone of active combat" and denied Petitioner the right to challenge whether or not he was seized within it, the appellate court's geographic limiting principle is, as Judge Motz noted, "in truth a chimera." (App. 64a.)

4. Read narrowly, as Judge Luttig and Judge Motz point out, the Fourth Circuit's ruling exposes any number of American citizens abroad—from embedded journalists to humanitarian aid workers to "unwitting tourists"—to indefinite incommunicado detention based on the thinnest of factual grounds. (App. 55a (Luttig, J.), 64a (Motz, J.).) Any citizen, in fact, that the Executive branch decides to label as "hostile" and "arrayed against our troops," (App. 18a), "could be imprisoned indefinitely without being charged with a crime or afforded legal counsel,

if the Executive asserted that the area [in which they were seized] was a zone of active combat." (App. 64a (Motz, J.).)

Read more broadly, the "zone of active combat" that defines the range of the Fourth Circuit's extraordinary refusal to inquire into a citizen's indefinite detention - is not confined by any readily cognizable boundaries of place, time, or circumstances.[12] It permits, as Judge Luttig observed, "superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant." (App 58a.) If not reversed, the Fourth Circuit's opinion may "have opened the door to the indefinite detention, without

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[12] As the Fourth Circuit noted, the Executive branch's authority to detain combatants exists only "during the duration of hostilities." (App.14a.) However, because the government represented "that American troops are still on the ground," the Fourth Circuit concluded that the armed conflict remained ongoing and rejected Petitioner's argument that the duration of the conflict must be determined by public pronouncements made by the political branches. (App.27a.) *Cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts empowered to construe public statements by political branches to determine end date of armed conflict); *Lincoln v. United States*, 197 U.S. 419, 429 (1905) (holding taxes collected on goods exported to Philippines and imposed pursuant to war power invalid after peace treaty notwithstanding ongoing insurrection); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871) (looking to "public act[s]" of the political departments to ascertain the beginning and end dates of the Civil War).

By making its own factual determination as to the duration of the conflict instead of relying on the public statements of the political branches as required by this Court's precedents, the Fourth Circuit eliminated any clear limitation on the duration of Hamdi's detention. Furthermore, as Judge Motz observed, the court blurred the distinction between Afghanistan and any other "part of the world where American troops are present—e.g., the former Yugoslavia, the Philippines, or Korea," with regard to the definition of a "zone of active combat." (App. 64a.)

access to a lawyer or the courts, of any American citizen, even one captured on American soil." (App. 65a n.5 (Motz, J.).) The Fourth Circuit's ruling, in sum, is little different from the "sweeping" proposition initially rejected by the same court: "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II*, 296 F.3d at 283. It is essential that this Court grant certiorari to address the nationally important issues raised by Petitioner's case.

II. The Court of Appeals' Ruling Conflicts with Decisions of this Court

A. Review Is Warranted Because the Ruling Conflicts with This Court's Opinions on the Power of Article III Courts to Examine Executive Detentions by Means of Habeas Corpus

The Fourth Circuit's holding that the separation of powers precludes the judiciary from engaging in any factual inquiry into military seizures alleged to take place within a zone of active combat, (App. 23a), is an invention out of whole cloth. It also directly conflicts with *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), and a line of other decisions establishing that the factual circumstances related to Executive seizures during wartime are subject to judicial review. Most importantly, however, the Fourth Circuit's opinion is inconsistent with cornerstone principles of our Republic, dating from well before the American Revolution, that evolved in resistence to the exercise of unchecked Executive power.

1. "At its historical core, the writ of habeas corpus has served as a means of

reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *accord Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Indeed, the unbridled power of the Executive to detain citizens by fiat was repudiated in England and its colonies, and replaced by the guarantee of independent judicial inquiry by means of the writ of habeas corpus. *See* 3 William Blackstone, Commentaries *129-38. In the aftermath of the reign of Oliver Cromwell, for example, the English Parliament passed the Habeas Corpus Act of 1641 authorizing the issuance of the writ of habeas corpus in favor of those imprisoned by the King's command. Dallin Oaks, *Legal History in the High Court–Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966). This tradition of judicial review of executive detention was embraced by the colonies. *See* A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 Am. Hist. Rev. 18, 26 (1902); *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1045 (1970).

Following American independence, this Court had occasion to secure the importance of this tradition in the United States. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court reviewed the pre-trial commitment of Aaron Burr's co-conspirators who had been detained on the basis of affidavits and a message from President Jefferson. *United States v. Bollman*, 24 F. Cas. 1189, 1195-96 (C.D.C.

1807) (No. 14,622). The Court, however, did not defer to the evidence presented by the government, but engaged in "an examination of the evidence upon which the commitment was grounded." 8 U.S. (4 Cranch) at 125. After scrutinizing the evidence marshaled against the detainees, the Court ordered their discharge on the ground that the government had failed to establish probable cause to detain the petitioners for trial on charges of treason. *Id.* at 136-37. *Ex parte Bollman* reveals that federal courts are well-positioned to evaluate the Executive branch's justification for detention even in cases involving the most sensitive threats to national security.

In contrast, the Fourth Circuit failed to cite a single court in the history of habeas corpus jurisprudence that has limited judicial review because of the separation of powers. *Cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 100 (1869) (rejecting argument that Court did not have jurisdiction to review military's imprisonment of citizen in Mississippi). That is because federal courts are fully equipped to evaluate conduct by the military that affects the rights of citizens, and determine whether that conduct is consistent with the Constitution. *See Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875); *Mitchell v. Harmony*, 54 U.S. (13 How.) at 134.

Congress, of course, has affirmatively authorized federal courts to "hear and determine the facts" in habeas corpus proceedings, and allowed habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material

facts." *See* 28 U.S.C. §§ 2243, 2246. By empowering federal courts to inquire into the nature of a person's confinement in a habeas corpus proceeding, Congress has ensured that the Judiciary can serve as a check against unauthorized Executive detentions.

Habeas corpus proceedings thus constitute part and parcel of the separation of powers between our branches of government. Urging ratification of the Constitution, James Madison stated that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48. The writ of habeas corpus is an instrument of this design. *See Parisi v. Davidson*, 405 U.S. 34, 49 (1972) (Douglas, J., concurring) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

2. The Fourth Circuit's analysis of the separation of powers doctrine, drawn almost exclusively from its reading of "the warmaking powers of Article I and II" of the Constitution, (App. 21a), ignores the language in Article I most directed to

Hamdi's predicament: the Suspension Clause.[13] Indeed, the Suspension Clause refutes the Fourth Circuit's unsupported view that Article III courts have no role in reviewing facts attending the indefinite seizure of an American citizen during wartime.

The Suspension Clause spells out two inalterable circumstances under which the suspension power may be exercised, and contemplates judicial review by means of habeas corpus proceedings in every other case—at least to the extent authorized in 1789. *St. Cyr*, 533 U.S. at 301; *see also Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1267 (1970). The Judiciary Act of 1789 enabled federal courts to issue writs of habeas corpus to prisoners in custody by "the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The dimension of this statutory authority, however, was rooted in the common law. *See Ex parte Bollman*, 8 U.S. (4 Cranch) at 94-95. And under the common law, judicial review of the return was least deferential in the context of executive detentions. *See* Rollin Hurd, *The Writ of Habeas Corpus* 271 (2d ed. 1876) (noting that in cases of noncriminal imprisonment, the exceptions to the general rule against controverting the return were "governed by a principle sufficiently comprehensive to include most . . . cases"); Jonathan Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2526 (1998) ("at common law executive detentions . . . triggered a broad scope of review on habeas").

[13] Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

Judicial review of executive detentions by way of habeas corpus historically was more searching than review of criminal convictions because of the absence of any prior judicial determination of the petitioner's rights. *See, e.g.*, Hurd, *supra*, at 268; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963); Hafetz, *supra*, at 2535-36. Under the guise of the separation of powers doctrine, however, the Fourth Circuit simply eliminated the extensive judicial review of Executive detentions protected by the Suspension Clause in favor of Executive power.

3. The Fourth Circuit's ruling also is entirely inconsistent with this Court's long experience with the review of Executive branch seizures. In *Mitchell v. Harmony*, this Court reviewed and rejected the military's seizure of a citizen's property in Mexico during the Mexican-American war. 54 U.S. (13 How.) at 128-29. The plaintiff, a naturalized American businessman, filed an action against a U.S. colonel to recover the value of his property seized by the military. The government responded that the businessman had a "design" to trade with the enemy, and that the decision of the military commander to seize the property "must be entitled to some respect." *Id.* at 118, 120.

Rejecting these arguments, Chief Justice Taney's opinion for the Court found the government's defense to be based on "rumors which reached the commanding officer." *Id.* at 133. "Mere suspicions of an illegal intention," the Court stated, "will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence." *Id.* If an Article III court, consistent with separation of powers principles, can inquire into the seizure of a citizen's property by the military within a country at war with the United States as in *Harmony*, these same principles surely pose no barrier to an inquiry into the seizure of the citizen himself.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court rejected the virtually identical argument accepted by the Fourth Circuit that the "constitutional allocation of war powers," (App. 25a), precludes the judiciary from reviewing the circumstances related to the exercise of such powers. *Sterling* involved the authority of the governor of Texas to restrict the production of private oil wells in areas declared to be under martial law. Acknowledging the governor's license to maintain order, the Court stated:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power, to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The

> contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

287 U.S. at 400-01 (citing *Harmony*, 54 U.S. (13 How.) at 134). The Executive branch's authority with respect to the war powers and national security, in other words, does not make immune from judicial inquiry actions by the Executive branch in the name of war powers or national security. *See New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring); *United States v. United States Dist. Court*, 407 U.S. 297, 331-32 (1972); *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Nor is the Fourth Circuit's decision supported by precedent addressing similar facts. Like this case, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), involved a habeas corpus petition filed by an American citizen to challenge his detention as a prisoner during World War II. Although the respondent filed a return "setting out . . . that Territo was captured in Italy upon the field of battle, and that he was at the time of capture a soldier in the enemy Italian Army," *id.* at 142-43, the district court held an evidentiary hearing—at which the petitioner was represented by counsel and allowed to testify—and subsequently issued factual findings. *Id.* at 142-43; *see also* Jess Bravin, *How a Ditchdigger for Mussolini Plays A Role in Terror War*, Wall St. J., Oct. 28, 2002, at A1, A11.

Even the Fourth Circuit suggested that its opinion constituted a departure from prior doctrine. (*See* App. 17a ("In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability.").) By holding that the military's indefinite detention of an American citizen, held far from any theater of combat, is immune from factual inquiry in a habeas corpus proceeding, however, the Fourth Circuit abdicated its role as an independent check on the Executive branch. Review by this Court is warranted because the Fourth Circuit's decision is both foreign to this Court's settled jurisprudence and contrary to the guarantee of independent habeas corpus review rooted in the Anglo-American legal tradition.

B. Review Is Warranted Because the Ruling Conflicts with This Court's Decisions Upholding the Fundamental Right to Court Access

Although the Fourth Circuit acknowledged that "Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention," (App. 22a), the court denied Petitioner the opportunity to participate in the proceeding or to have access to his appointed lawyer.[14] By refusing

[14] According to the Fourth Circuit, "no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch." (App. 24a.) For this reason, the Fourth Circuit refused to permit Hamdi to "be heard in an Article III court to rebut the factual assertions that were

to permit either, the Fourth Circuit transformed Hamdi's entitlement into a fundamentally hollow exercise, and violated a line of this Court's precedents that support the constitutional guarantee of access to the courts.

The right of access to the courts is undeniably "well-established" by this Court's precedent, *Lewis v. Casey*, 518 U.S. 343, 350 (1996), and in its most basic form requires that "the state and its officers may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). Likewise, the government may not interfere with a habeas petitioner's assertion of legal claims. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."); *accord Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

By refusing to allow Petitioner to participate in a habeas proceeding filed on his behalf, the Fourth Circuit's decision is incompatible with these bedrock principles expressed in this Court's precedent. As Judge Motz observed, "[d]enied the most basic procedural protections, Hamdi could not possibly mount a challenge to the

submitted to support the 'enemy combatant' designation." (*Id.*) Likewise, the Fourth Circuit steadfastly refused to permit Hamdi to meet with appointed counsel. *See Hamdi II*, 296 F.3d 278, 284 (4th Cir. 2002).

Executive's designation of him as an enemy combatant." (App. 63a.) Without the ability to speak to the allegation that one is an "enemy combatant," in other words, Petitioner has had no meaningful opportunity to assert the claim that his imprisonment is unlawful.

By the same token, the Fourth Circuit's refusal to allow Petitioner to have access to appointed counsel is equally inconsistent with this Court's precedent ensuring the right to court access. In *Procunier v. Martinez*, 416 U.S. 396, 419, 421-22 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court struck down a ban on the use of law students and paralegals to interview inmates because it "constituted an unjustifiable restriction on the right of access to the courts." Inmates "must have a reasonable opportunity to seek and receive the assistance of attorneys," the Court explained, in order to vindicate the right to access to courts guaranteed by the Due Process Clause. *Id.* at 419; *see also Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Ex parte Hull*, 312 U.S. at 549.

The restriction on access to courts at issue in *Procunier* pales in comparison to the limitation imposed by the Fourth Circuit. As a result of the Fourth Circuit's ruling, Americans alleged to be "enemy combatants" and purportedly found in a "zone of active combat" simply are not entitled to meet with appointed counsel. Although this Court has said that the government "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), the

Fourth Circuit's ruling does so in direct conflict with an established line of this Court's precedent ensuring the right of habeas petitioners to access to the courts.

III. Review Is Warranted Because the Ruling Is Contrary to Constitutional Protections and Congressional Limitations Against Indefinite Detention Without Due Process

A. The Due Process Clause Prohibits Hamdi's Indefinite and Effectively Incommunicado Detention Without a Hearing

The Fourth Circuit's ruling authorizes an unprecedented denial of both procedural and substantive due process to American citizens accused as enemy combatants. By refusing to allow Petitioner to be heard, and by acquiescing to his virtually incommunicado detention, the Fourth Circuit's opinion is flatly inconsistent with the requirements of the Due Process Clause.

The due process interest at stake is manifest. As this Court has remarked, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). And while the Fourth Circuit suggested that Hamdi's imprisonment does not constitute "punishment," but rather is a "simple war measure," (App. 16a), the truth is otherwise. Hamdi is not being treated as an ordinary prisoner of war,[15] and has not

[15] Prisoners of war generally cannot be held in correctional facilities, EPW Reg. 3-2(b) (J.A. 99), separated from their fellow soldiers, *id.* 3-4(b) (J.A. 100), quartered under conditions less favorable than U.S. troops, *id.* 3-4(e) (J.A. 101), or

been treated in accordance with the Geneva Convention Relevant to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and United States military regulations designed to implement the GPW. *See* EPW Regulations (J.A. 91-126).[16]

1. The right to be heard in opposition to the government's effort to strip a person of his liberty is at the heart of the procedural protections due under the Constitution. *See Lachance v. Erickson*, 522 U.S. 262, 265 (1998); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Hughes v. Rowe*, 449 U.S. 5, 11 (1980); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or

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restricted from receiving mail, *id.* 3-5(a) (J.A. 101.)

[16] The Fourth Circuit held that the GPW was unenforceable because it evinces no intent to provide a right of action and therefore is not self-executing. The habeas statute itself, however, authorizes review of detention in violation of treaties. 28 U.S.C. § 2242(c)(3); *cf.* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995) (explaining that whether treaty confers a right of action is "analytically distinct" from the question of self-execution).

As for the EPW Regulations designed to implement the GPW, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974); *accord Billings v. Truesdell*, 321 U.S. 542, 551 (1944); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942). The EPW Regulations provide that if any doubt exists whether a person is a prisoner of war, the person must be treated as such until his status is determined by a competent tribunal. EPW Reg. 1-6 (J.A. 96).

contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). By refusing to allow Petitioner to be heard in this habeas corpus proceeding, the Fourth Circuit has denied Petitioner this basic constitutional right.

Detention without the opportunity to be heard, moreover, constitutes a paradigmatic affront to the Due Process Clause. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-602 (1953); *accord Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious."). "[The Court] need go no further" to find the Executive branch's treatment of Hamdi unconstitutional. *See Kennedy*, 472 U.S. at 167.

In the absence of review by this Court, the Fourth Circuit's opinion threatens to permit the indefinite and virtually incommunicado imprisonment of innocent Americans by the government. As this Court acknowledged shortly after the Civil War, "military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony." *Lamar v. Brown*, 92 U.S. 187, 196 (1875); *accord* (App. 24a ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake.").) Indeed, such mistakes have been made by our forces in Afghanistan. *See* Carlotta Gall, *U.S. Sends 18 at Guantanamo To Afghanistan to Be*

Freed, N.Y. Times, Mar. 25, 2003, at B13; Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. Times, Dec. 22, 2002, at 1. At the significant risk of indefinitely perpetuating such errors made overseas, the appeals court refused to permit an American citizen—held for the most part within a few miles of an operating United States District Court—to meet with appointed counsel or the opportunity to have a voice in the underlying habeas proceedings in order to establish that a mistake had been made. This aspect of the lower court's decision "deserves repudiation." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

While the government's interest in detaining persons who fought for the former government in Afghanistan is not insubstantial, (*see* App. 16a), the Constitution requires that an American citizen indefinitely detained under that suspicion should be permitted the opportunity to be heard. The Fourth Circuit's contrary conclusion is worthy of review by this Court.

2. "[T]he Due Process Clause [also] contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). This substantive element prohibits, for example, government intrusion into certain intimate private conduct, *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003), interference in the exercise of parental rights, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), egregious and shocking

conduct by the government, *Chavez v. Martinez*, 123 S. Ct. 1994, 2005 (2003); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); and arbitrary deprivations of liberty, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting); *Daniels*, 474 U.S. at 331.

The Executive branch's treatment of Petitioner is comparable to the type of conduct that offends the "decencies of civilized conduct" central to substantive due process. *See Rochin v. California*, 342 U.S. 165, 173 (1952); *cf. Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1726 (2003) (Kennedy, J., concurring) (noting relation between the need for continued detention and prohibition on arbitrary deprivations of liberty). Under the Fourth Circuit's ruling, in the absence of press coverage or an eligible "next friend," an American citizen labeled as an "enemy combatant" may be entirely unknown to the legal system, a possibility that could not be more at odds with the Constitution. *Cf.* The Federalist No. 84 (Alexander Hamilton) ("[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government."). Whether the effectively incommunicado detention and interrogation of an American citizen for almost two years is consistent with the substantive protections afforded by the Due Process Clause deserves plenary review by this Court.

B. Congress Prohibited the Executive Branch from the Indefinite Detention of American Citizens Without Process

The Constitution provides no inherent authority for the Executive branch to indefinitely detain American citizens in the United States, and Congress has expressly forbidden it in the absence of statutory authorization. Indeed, Congress could not have been more clear in requiring explicit legislative authority for the detention of citizens. *See* 18 U.S.C. § 4001(a). Because the Executive branch possesses power solely by virtue of the Constitution and the Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), and no statute explicitly permits the indefinite detention at issue, the unprecedented expression of Executive power upheld by the Fourth Circuit is illegitimate.

Section 4001(a) of Title 18 states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The statute "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The fact that only Congress may authorize detentions in the United States is not a recent innovation. It is Congress, not the President, that is empowered under the Constitution to suspend the writ of habeas corpus. *Ex parte Merryman*, 17 F. Cas. 144, 149-50 (C.C. Md. 1861). Furthermore, as this Court acknowledged long before

the passage of § 4001(a), "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." *Valentine v. United States*, 299 U.S. 5, 9 (1936); *cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (Chase, C.J., concurring) ("[I]n our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain."). Authorization for the detention of citizens, in other words, is not a subject "within [the President's] domain and beyond control by Congress." *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring).[17]

Even in the context of the exercise of war powers, Congress must supply the authority to detain outside of the environment of actual fighting. One of the earliest statutes passed by Congress, for example, was the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577, which allowed the President to detain and deport enemy aliens found in the United States following a formal declaration of war. *See Ludecke v. Watkins*, 335 U.S. 160, 161 (1948). Any Executive power to indefinitely detain Hamdi in the United States, similarly, must be drawn from congressional authorization.

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[17] To the extent that the Fourth Circuit located an inherent Executive power to detain citizens, such authority is "most vulnerable to attack and in the least favorable of possible constitutional postures." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637, 640 (Jackson, J., concurring). The exercise of such authority could be sustained only if the detention of citizens was "beyond control" by Congress, *see id.*, a proposition plainly contrary to § 4001(a), not to mention the rest of Title 18 of the U.S. Code.

The Fourth Circuit held that, by authorizing the Executive branch to "use all necessary and appropriate force" against the countries, organizations, or individuals that committed the terrorist attacks that took place on September 11, 2001, Authorization for Use of Military Force, Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), Congress *implicitly* authorized the Executive branch to detain belligerents, including citizens, in the absence of a provision that "provide[d] American belligerents some immunity from capture and detention." (App. 19a.) The authorization for the use of force, naturally, is silent with regard to the indefinite detention of American citizens.

Contrary to the Fourth Circuit's ruling, however, implicit wartime powers sustain only the least burdensome restraint on citizens that is demanded by the most explicit statutory language:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, *when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.*

Ex parte Endo, 323 U.S. 283, 300 (1944) (emphasis added).[18] Accordingly, the Court in *Endo* held that Congress, under the auspices of a statutory evacuation program, had not "clearly and unmistakably" authorized the indefinite detention of citizens of Japanese descent. *Id.* at 303-04.

The Court's holding in *Endo* reflects a long tradition of close scrutiny applied to statutes cited in support of military control over citizens. *See Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress did not intend to supplant civilian court system when it authorized martial law in territory of Hawaii); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (holding that military order annulling judicial order unauthorized by Congress and therefore void); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 135 (Chase, C.J., concurring) (noting that Congress had not authorized Milligan's seizure). The absence of an

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[18] Similarly, this Court found that general congressional appropriations that do not "plainly show a purpose to bestow the precise authority which is claimed" were insufficient to justify the detention of American citizens. *Id.* at 303 n.24. The government in *Endo* made no argument that the congressional declaration of war by itself permitted the indefinite detention of citizens. *See* U.S. Const. art. I, § 8 cl. 11.

explicit congressional grant of authority, in other words, establishes the unlawfulness of military authority over citizens.

The Fourth Circuit's analysis not only presupposes the belligerent character of American detainees—or at least that such character is a unilateral and unreviewable Executive determination—but it also approaches the question of Executive power from the wrong starting place. By asking whether Congress in its authorization for the use of force has expressly withheld from the Executive branch, rather than expressly authorized, the detention of citizens, the Fourth Circuit assumes the existence of a power to indefinitely detain Americans that the Executive branch does not possess.

Because no statute "clearly and unmistakably" authorizes the Executive branch to indefinitely detain Hamdi as required by 18 U.S.C. § 4001(a), his continued detention is unlawful. The Fourth Circuit's authorization of the Executive branch's detention of Petitioner without statutory authority warrants plenary review by this Court.

CONCLUSION

The Constitution requires that Petitioner be allowed to challenge his indefinite detention, meet with counsel, present evidence, and participate in his habeas corpus proceeding. As the Fourth Circuit recognized in *Hamdi II*, 296 F.3d at 283, however, the procedures governing that inquiry must be crafted by the district court in the first

instance and must be designed to both protect the government's legitimate security concerns as well as ensure the court's ability to exercise independent review of Petitioner's detention.

The threat posed by the accumulation of power in one branch of government, an evil well-known to the Founders, is a guiding principle behind the Constitution. In support of ratification, Alexander Hamilton quoted from Montesquieu: "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78. Because the Fourth Circuit's decision requires no separation between the exercise of Executive power and the judgment that leads to the indefinite and effectively incommunicado imprisonment of an American citizen, it poses a grave threat to the liberty of all Americans.

The petition for a writ of certiorari should be granted.

FRANK W. DUNHAM, JR.
Federal Public Defender
for the Eastern District of Virginia

Frank W. Dunham, Jr.
Federal Public Defender
Counsel of Record
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

October 1, 2003

APPENDIX

C. Prejudgment Interest

[23] Scottsdale claims that even if there was a duty to represent Freddie Mac, the district court should not have granted prejudgment interest because, in Scottsdale's view, "since no demand for a copy of the policy and/or coverage was made before the settlement was reached, no prejudgment interest is owed." *Id.* at 56.

In *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3d Cir.1998), we held that "[u]nder New Jersey law, a court may award prejudgment interest in its discretion in accordance with equitable principles, and the court's exercise of its discretion should not be disturbed on appeal unless it represents a manifest denial of justice." *Id.* at 574 (citations and internal quotation marks omitted). Scottsdale does not make any argument that there was a manifest denial of justice, and we therefore reject this challenge.

IV.

Freddie Mac's cross-appeal, at No. 01-4356, raises only a single issue. In Freddie Mac's view, the district court erred in setting October 25, 1999, as the date from which prejudgment interest would run.

[24] As we noted above, we review a district court's award of prejudgment interest to determine whether such award constituted a manifest denial of justice. Freddie Mac has merely argued that because the New Jersey court rule governing prejudgment interest applies by its terms to tort actions only, the district court did not have to consider itself bound to apply the rule's terms literally when it awarded prejudgment interest in its discretion. Instead, Freddie Mac claims that the district court should have concluded that prejudgment interest should run from the dates when Freddie Mac issued settlement payments—in June and August 1998. Freddie Mac. Br. at 59.

Freddie Mac has made no argument, nor given us reason to hold, that the district court's exercise of discretion constituted a manifest denial of justice. We will therefore affirm the district court's judgment against Freddie Mac in its cross-appeal.

V.

For the foregoing reasons, we will affirm the judgment of the district court in all respects.

Yaser Esam HAMDI; Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi, Petitioners-Appellees,

v.

Donald RUMSFELD; W.R. Paulette, Commander, Respondents-Appellants.

Center for Constitutional Rights; Richard L. Abel, Connell Professor of Law, University of California at Los Angeles; William J. Aceves, Professor of Law, California Western School of Law; Bruce A. Ackerman, Sterling Professor of Law & Political Science, Yale University; Lee A. Albert, Professor of Law, University at Buffalo Law School, The State University of New York; Barbara Bader Aldave, Loran L. Stewart Professor of Corporate Law, University of Oregon School of Law; Alicia Alvarez, Clinical Associate Professor of Law, DePaul University School of Law; Diane Marie Amann, Professor of

Law, University of California, Davis, School of Law; Michelle J. Anderson, Associate Professor of Law, Villanova University School of Law; Fran Ansley, Professor of Law, University of Tennessee College of Law; Elvia R. Arriola, Associate Professor of Law, Northern Illinois University College of Law; Frank Askin, Professor of Law and Robert Knowlton Scholar, Rutgers School of Law at Newark; Milner S. Ball, Caldwell Professor of Constitutional Law, University of Georgia School of Law; Jon Bauer, Clinical Professor of Law and Director, Asylum & Human Rights Clinic University of Connecticut School of Law; Paul Schiff Berman, Associate Professor, University of Connecticut School of Law; Cynthia Bowman, Professor of Law, Northwestern University School of Law; Mark S. Brodin, Professor of Law, Boston College Law School; Bartram S. Brown, Professor of Law, Chicago–Kent College of Law, Illinois Institute of Technology; Sue Bryant, Director of Clinical Education and Associate Professor of Law, CUNY School of Law; Burton Caine, Professor of Law, Temple University School of Law; Emily Calhoun, Professor of Law, University of Colorado School of Law; Anupam Chander, Acting Professor of Law, University of California, Davis, School of Law; Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School; Paul G. Chevigny, Joel S. and Anne B. Ehrenkranz Professor of Law, New York University Law School; Paul Chill, Clinical Professor of Law, University of Connecticut School of Law; Gabriel J. Chin, Rufus King Professor of Law, University of Cincinnati College of Law; Carol Chomsky, Associate Professor of Law, University of Minnesota Law School; Margaret Chon, Associate Professor of Law, Seattle University School of Law; Marjorie Cohn, Associate Professor of Law, Thomas Jefferson School of Law, San Diego; Robin Morris Collin, Professor of Law, University of Oregon School of Law; Dennis E. Curtis, Clinical Professor of Law, Yale Law School; Erin Daly, Associate Professor of Law, Widener University; Michael H. Davis, Professor of Law, Cleveland State University; Michael Deutsch, Adjunct Professor of Law, Northwestern University School of Law; Laura Dickinson, Associate Professor, University of Connecticut School of Law; Robert Dinerstein, Associate Dean and Professor of Law, American University, Washington College of Law; Jane Dolkart, Associate Professor of Law, Dedman School of Law, Southern Methodist University; Sharon Dolovich, Acting Professor of Law, University of California at Los Angeles; Douglas L. Donoho, Professor of Law, Nova Southeastern University, Shepard Broad Law Center; Dolores Donovan, Professor of Law, University of San Francisco School of Law; Mary L. Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School; Visiting Research Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University; Pamela Edwards, Assistant Professor of Law, CUNY School of Law; Nancy Ehrenreich, Associate Professor of Law, University of Denver College of Law; Rosa Ehrenreich Brooks, Associate Professor of Law, University of Virginia School of Law; J. Soffiyah Elijah, Clinical Instructor, Criminal Justice Institute, Harvard Law School; Susan J. Feathers, Esq., Director, Public Service Program, University of Pennsylvania Law School; Marvin Fein, Associate Professor, University of Pittsburgh School of Law; Todd D. Fernow, Professor of Law, Director, Criminal Clinic, University of Connecticut School of Law; Sally Frank, Professor of Law, Drake University School of Law; Katherine Franke, Professor of Law, Columbia University; Eric M. Freedman, Professor of Law, Hofstra University School of Law; Niels W. Frenzen, Clinical Assistant Professor of Law, University of Southern California; Craig B. Futterman, Assistant Clinical Professor of Law, University of Chicago Law School; Kristin Booth Glen, Dean and Professor of Law, CUNY School of Law; Brian Glick, Associate Clinical Professor of Law, Fordham Law School; Howard A. Glickstein, Dean and Professor of Law, Touro Law School; Phyllis Goldfarb, Professor of Law, Boston College Law School; Bob Golten, Director, International Human Rights Advocacy Center, University of Denver; Carlos E. Gonzalez, Associate Professor of Law, Rutgers School of Law—Newark; Visiting Associate Professor of Law, Santa Clara University School of Law; Kenneth W. Graham, Jr., Professor of Law, University of California at Los Angeles; Ariela Gross, Professor of Law & History, The Law School, University of Southern California; Louise Halper, Professor of Law, Washington & Lee University School of Law; Joel F. Handler, Richard C. Maxwell Professor of Law and Professor of Policy Studies, School of Public Policy and Social Research, University of California at Los Angeles; Sidney L. Harring, Professor of Law, CUNY Law School; Virginia Hench, Associate Professor of Criminal Law & Procedure & Civil Rights, University of Hawaii—Manoa; Kathy Hessler, Professor, Case Western Reserve University School of Law; Judith L. Holmes, Assistant Professor of Legal Studies, University of Massachusetts—Amherst; Wythe W. Holt, Jr., University Research Professor of Law, University of Alabama School of Law; Joan Howarth, Professor of Law, University of Nevada, Las Vegas; Marsha Huie, Professor of Law, The University of Tulsa College of Law; Eric S. Janus, Professor of Law, William Mitchell College of Law; Paula C. Johnson, Associate Professor of Law, Syracuse University College of Law; Jose R. Juarez, Jr., Professor of Law, St. Mary's University School of Law; David Kairys, James E. Beasley Professor of Law, Beasley School of Law, Temple University; Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, University of Michigan; Jerry Kang, Professor of Law, University of California at Los Angeles; Lewis R. Katz, John C. Hutchins Professor of Law, Case Western Reserve University Law School; Eileen Kaufman, Professor of Law, Touro Law School; Michael J. Kelly, Assistant Professor, Creighton University School of Law; Raneta Lawson Mack, Professor of Law, Creighton University School of Law; David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law

School, Los Angeles; John Leubsdorf, Professor of Law, Rutgers Law School–Newark; Martin L. Levy, Professor, Thurgood Marshall School of Law, Texas Southern University; Jules Lobel, Professor of Law, University of Pittsburgh Law School; David Luban, Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center; Beth Lyon, Assistant Professor of Law, Villanova University School of Law; Holly Maguigan, Professor of Clinical Law, New York University School of Law; Samuel A. Marcosson, Associate Professor, Louis D. Brandeis School of Law, University of Louisville; Gary M. Maveal, Associate Professor of Law, University of Detroit Mercy School of Law; Robert F. Meagher, Emeritus Professor, Fletcher School of Law and Diplomacy, Tufts University; Carlin Meyer, Professor of Law, New York Law School; Jonathan M. Miller, Professor of Law, Southwestern University School of Law; Margaret E. Montoya, Professor of Law, University of New Mexico School of Law; Beverly Moran, Professor of Law, Professor of Sociology, Vanderbilt University School of Law; David A. Moran, Assistant Professor of Law, Wayne State University Law School; Mary-Beth Moylan, Instructor of Law, University of the Pacific, McGeorge School of Law; Millard A. Murphy, Esq., Clinical Instructor, Prison Law Clinic, University of California, Davis, School of Law; Kenneth B. Nunn, Professor of Law, Fredric G. Levin College of Law, University of Florida; James P. Ogilvy, Associate Professor of Law, Columbus School of Law, The Catholic University of America; Nancy K. Ota, Professor of Law, Albany Law School; Marc R. Poirier, Professor of Law, Seton Hall Law School; James Pope, Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law; Deborah W. Post, Professor of Law, Touro Law School; William Quigley, Professor of Law and Director of the Loyola Law Clinic & the Gillis Long Poverty Law Center, Loyola Law School; Margaret Jane Radin, Wm. Benjamin Scott and Luna M. Scott Professor of Law, Stanford Law School; Martha Rayner, Associate Clinical Professor of Law, Fordham University School of Law; Judith Resnick, Arthur Liman Professor of Law, Yale Law School; Paula R. Rhodes, Associate Professor of Law, Director, LLM in American and Comparative Law Program, University of Denver College of Law; Henry J. Richardson, III, Peter J. Liacouras Professor of Law, Temple Law School; Annelise Riles, Professor of Law and Professor of Anthropology, Cornell University; Toni Robinson, Professor of Law, Quinnipiac School of Law; Florence Wagman Roisman, Professor of Law and Paul Beam Fellow, Indiana University School of Law–Indianapolis; Kermit Roosevelt, Assistant Professor, University of Pennsylvania Law School; Tanina Rostain, Associate Professor, New York Law School; Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale University; David Rudovsky, Senior Fellow, University of Pennsylvania Law School; Leila Nadya Sadat, Professor of Law, Washington University in St. Louis; Natsu Taylor Saito, Professor of Law, Georgia State University College of Law; Robert F. Seibel, Professor of Law, CUNY Law School; Franklin Siegel, City University of New York School of Law; Robert A. Sedler, Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties, Wayne State University; Marci Seville, Associate Professor of Law and Director, Women's Employment Rights Clinic, Golden Gate University School of Law; Marjorie Silver, Professor, Touro Law Center; Eileen Silverstein, Zephaniah Swift Professor of Law, University of Connecticut; David Sloss, Assistant Professor of Law, Saint Louis University School of Law; Ronald C. Slye, Associate Professor, Seattle University School of Law; Lloyd B. Snyder, Professor of Law, Cleveland State University; Andrej Thomas Starkis, Assistant Professor of Law, Massachusetts School of Law; Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law; Joan Steinman, Distinguished Professor of Law, Chicago-Kent College of Law; Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law; Robert L. Tsai, Assistant Professor of Law, University of Oregon School of Law; Beth Van Schaack, Assistant Professor, Santa Clara University School of Law; Deborah M. Weissman, Associate Professor of Law and Director of Clinical Programs, University of North Carolina School of Law; Charles E. Wilson, Associate Professor of Law, The Ohio State University College of Law; Richard J. Wilson, Professor, Washington College of Law, American University; Adam Winkler, Acting Professor of Law, University of California at Los Angeles; Stephen Wizner, William O. Douglas Clinical Professor of Law and Supervising Attorney, Yale Law School; Mark E. Wojcik, Associate Professor of Law, The John Marshall Law School, Chicago; Frank H. Wu, Professor of Law, Howard University; Cliff Zimmerman, Clinical Associate Professor of Law, Northwestern University; National Lawyers' Guild, Heidi Boghosian, Executive Director; National Immigration Project of The National Lawyers Guild, Dan Kesselbrenner, Executive Director; National Lawyers Guild New York Chapter, Dana Biberman, President; Human Rights Watch, James Ross, Senior Legal Counsel; Southern Poverty Law Center, Rhonda Brownstein, Legal Director; Unitarian Universalist Service Committee, Denise Moorehead, Deputy Director of Program; Puerto Rico Legal Defense and Education Fund, Incorporated, Foster Maer, Acting Legal Director; National Coalition to Protect Political Freedom, Kit Gage, President; First Amendment Foundation, Kit Gage, Director; National Lawyer's Guild/Maurice & Jane Sugar Law Center For Economic & Social Justice, Julie Hurwitz, Executive Director; Civil Liberties Monitoring Project, Jared Rossman, President; Association of Legal Aid Attorneys, U.A.W. Local 2325, Michael Letwin, Esq., President; Partnership for Civil Justice, Mara Verheyden-Hilliard, co-founder; Trial Lawyers for Public Justice, Rebecca Epstein, Staff Attorney; Freedom Socialist Party, Val Carlson; Jewish Alliance for Law and Social Action, Andrew M. Fischer; The Innocence Project at The Benjamin N. Cardozo School of Law, Nina Morrison, Esq., Executive Director; Ella Baker Center for Human Rights, Van Jones, National Executive Director; American Friends Service Committee, Mary Ellen McNish, General Secretary; Reber Boult, Esq., Albuquerque, New

Mexico; Hunter Gray; John Mage, Esq., New York, New York; Douglas N. Masters, Esq., Chicago, Illinois; Laura Beth Nielsen, Research Fellow, American Bar Foundation; Leonard Weinglass, Esq., New York, New York; Camille Whitworth, Esq., Austin, Texas; Mitchell Zimmerman, Esq., Co-Coordinator, Law Professors for the Rule of Law; National Association of Criminal Defense Lawyers; American Civil Liberties Union Foundation; American Civil Liberties Foundation of Virginia, Amici Curiae in support of Appellees.

Ruth Wedgwood, Professor of Law, Yale University Law School; Samuel Estreicher, Professor of Law, New York University School of Law; Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, Catholic University; Ronald Rotunda, George Mason University Foundation Professor of Law, George Mason University School of Law; David B. Rivkin, Jr.; Lee A. Casey; Darin R. Bartram, Amici Curiae in support of Appellants.

No. 02-7338.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 28, 2002.

Decided Jan. 8, 2003.

Father of military detainee, an American citizen who was captured as an alleged enemy combatant during military operations in Afghanistan, petitioned, as detainee's next friend, for writ of habeas corpus. The United States District Court for the Eastern District of Virginia, Robert G. Doumar, J., appointed counsel and ordered government to allow counsel unmonitored access to detainee. Government appealed. The Court of Appeals, 296 F.3d 278, reversed and remanded. On remand, the United States District Court for the Eastern District of Virginia, Robert G. Doumar, Senior District Judge, ordered production of additional material regarding detainee's status, and government petitioned for interlocutory review. The Court of Appeals held that: (1) detention was authorized by Congress; (2) detainee did not have right under Geneva Convention to formal hearing to determine his status as enemy belligerent; (3) district court's order impermissibly conflicted with constitutional warmaking powers of President and Congress; and (4) government's affidavit was sufficient to establish that detention conformed with legitimate exercise of the President's war powers.

Reversed and remanded with directions.

1. Constitutional Law ⇐50, 76

Congress and the President, like the courts, possess no power not derived from the Constitution.

2. War and National Emergency ⇐2

Constitutional war powers invest the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war. U.S.C.A. Const. Art. 2, § 2, cl. 2.

3. War and National Emergency ⇐11

President's war powers include the authority to detain those captured in armed struggle.

4. War and National Emergency ⇐11, 29

President's war powers extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, and to confiscate or destroy enemy property. U.S.C.A. Const. Art. 2, § 2, cl. 2.

5. Constitutional Law ⇐72

Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited.

6. Constitutional Law ⇐67

Duty of the judicial branch to protect our individual freedoms does not simply cease whenever military forces are committed by the political branches to armed conflict.

7. Habeas Corpus ⇐441

Detention of United States citizens must be subject to judicial review.

8. Habeas Corpus ⇐461

Habeas petition challenging detention of American citizen as enemy combatant following his capture during military operations in Afghanistan fell within scope of habeas review, since detainee was an American citizen challenging his summary detention for reasons of state necessity.

9. War and National Emergency ⇐11

There is a well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, and enemy belligerents, prisoners of war, and others charged with violating the laws of war.

10. War and National Emergency ⇐11

Object of capture of enemy combatant is to prevent the captured individual from serving the enemy; he is disarmed and from then on he must be removed as completely as practicable from the front.

11. Constitutional Law ⇐67

Judiciary is not at liberty to eviscerate detention interests directly derived from constitutional war powers.

12. Federal Courts ⇐768.1

Appellate court may address any issue fairly included within the certified order, because it is the order that is appealable, and not the controlling question identified by the district court.

13. Habeas Corpus ⇐818

Challenges to validity of American citizen's detention as enemy combatant following his capture during military operations in Afghanistan was includable within the scope of the certified order entered in habeas proceeding, certifying question of whether government's declaration was sufficient to allow meaningful judicial review of detainee's classification as enemy combatant. Fed.Rules Civ.Proc.Rule 26(b)(1, 2), 28 U.S.C.A.

14. Habeas Corpus ⇐911

Court of Appeals' refusal to order habeas relief requested by petitioner, an American citizen who was held as enemy combatant following his capture during military operations in Afghanistan, was not equivalent to unconstitutional suspension of the writ. U.S.C.A. Const. Art. 1, § 9, cl. 2.

15. War and National Emergency ⇐11

Even if statute regulating detention of United States citizens required Congressional authorization for detention of American citizen as enemy combatant following his capture during military operations in Afghanistan, Congress authorized such detention when it authorized President to "use all necessary and appropriate force"

against nations, organizations, or persons involved in September 11 terrorist attacks and made appropriations for the detention of persons "similar to prisoners of war." 18 U.S.C.A. § 4001; 10 U.S.C.A. § 956(5).

16. **War and National Emergency** ⇐11

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency.

17. **Treaties** ⇐12, 13
War and National Emergency ⇐11

American citizen who was detained as enemy combatant following his capture during military operations in Afghanistan did not have right under Geneva Convention Relative to the Treatment of Prisoners of War to formal hearing to determine his status as enemy belligerent; Convention was not self-executing.

18. **Treaties** ⇐12

Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.

19. **Treaties** ⇐12, 13
War and National Emergency ⇐11

Geneva Convention Relative to the Treatment of Prisoners of War is not self-executing and does not create private rights of action in the domestic courts of the signatory countries.

20. **War and National Emergency** ⇐11, 32

Unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful; but they are also subject to mere detention in precisely the same way that lawful prisoners of war are.

21. **Constitutional Law** ⇐70.1(12), 72
Habeas Corpus ⇐688
War and National Emergency ⇐11

Order entered in habeas proceeding, requiring government to produce various materials relating to American citizen's capture in Afghanistan in order to justify his continued detention as enemy combatant, impermissibly conflicted with constitutional warmaking powers of President and Congress; specific interests asserted by the government flowed directly from its warmaking powers and were intimately connected to them. 28 U.S.C.A. § 2241.

22. **Constitutional Law** ⇐76

The President is best prepared to exercise the military judgment attending the capture of alleged combatants.

23. **Constitutional Law** ⇐72
War and National Emergency ⇐11

Detentions ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger should not be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

24. **Habeas Corpus** ⇐711

It is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority.

25. **War and National Emergency** ⇐11

Government's affidavit describing capture of American citizen in active combat zone during military operations in Afghanistan was sufficient to establish that his detention as enemy combatant conformed with legitimate exercise of President's war powers; government alleged that detainee was affiliated with enemy military unit and was in possession of a rifle at time he surrendered to Allied forces. U.S.C.A. Const. Art. 2, § 2, cl. 2.

26. **Habeas Corpus** ⇐461
War and National Emergency ⇐32

Habeas petitioner, an American citizen who was captured in zone of active combat operations in Afghanistan and was detained on American soil as enemy combatant, was not entitled to evidentiary hearing or factual inquiry by Article III court to rebut factual assertions that were submitted by government to support his enemy combatant designation.

27. **Constitutional Law** ⇐72

Courts cannot set aside executive decisions to detain enemy combatants without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

28. **Constitutional Law** ⇐72
War and National Emergency ⇐37

Constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. U.S.C.A. Const. Art. 2, § 2, cl. 2.

29. **Constitutional Law** ⇐72

While the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

30. **Habeas Corpus** ⇐662.1
War and National Emergency ⇐11

American citizenship of petitioner held as enemy combatant following his capture during military operations in Afghanistan entitled him to file habeas petition to challenge his detention, but did not affect the legality of his detention.

31. **War and National Emergency** ⇐11

One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.

32. **War and National Emergency** ⇐11

For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another.

33. **War and National Emergency** ⇐11

Hostilities leading to petitioner's capture had not reached an end, supporting his continued detention as enemy combatant following his surrender during military operations in Afghanistan; American troops were still on the ground in Afghanistan, dismantling terrorist infrastructure and engaging in reconstruction efforts which could prove dangerous in their own right.

ARGUED: Paul Clement, Deputy Solicitor General, United States Department of Justice, Washington, D.C., for Appellants. Frank Willard Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Gregory G. Garre, Assistant to the Solicitor General, David B. Salmons, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, United States Department of Justice, Washington, D.C., for Appellants. Larry W. Shelton, Assistant Federal Public Defender, Geremy C. Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. David B. Rivkin, Jr., Lee A. Casey, Darin R. Bartram, Baker & Hostetler, L.L.P., Washington, D.C., for Amici Curiae Ruth Wedgwood, et al. Shayana Kadidal, Barbara Olshansky, Michael Ratner, William

Goodman, Center for Constitutional Rights, New York, New York, for Amici Curiae Center for Constitutional Rights, et al. Steven D. Benjamin, Richmond, Virginia; Donald G. Rehkopf, Jr., Brenna & Brenna, Rochester, New York, for Amicus Curiae Association of Criminal Defense Lawyers. Steven R. Shapiro, Lucas Guttentag, Arthur N. Eisenberg, Robin Goldfaden, American Civil Liberties Union Foundation, New York, New York; Rebecca K. Glenberg, American Civil Liberties Union of Virginia, Richmond, Virginia, for Amici Curiae ACLU, et al.

Before WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded with directions to dismiss by published opinion. Opinion by WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges, in which all three concur.

WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Yaser Esam Hamdi filed a petition under 28 U.S.C. § 2241 challenging the lawfulness of his confinement in the Norfolk Naval Brig.[1] On this third and latest appeal, the United States challenges the district court's order requiring the production of various materials regarding Hamdi's status as an alleged enemy combatant. The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

I.

As recounted in earlier appeals regarding Hamdi's detention, *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir.2002) ("*Hamdi I*"), and *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir.2002) ("*Hamdi II*"), the al Qaida terrorist network, utilizing commercial airliners, launched massive attacks on the United States on September 11, 2001, successfully striking the World Trade Center in New York City, and the Pentagon, the military headquarters of our country, near Washington, D.C. A third unsuccessful attack upon at least one additional target, most likely within Washington, D.C., was foiled by the efforts of the passengers and crew on the hijacked airliner when it crashed in Somerset County, Pennsylvania, southeast of Pittsburgh. In total, over 3,000 people were killed on American soil that day.

In the wake of this atrocity, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001). The President responded by ordering United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime supporting it. During this ongoing military operation, thousands of alleged enemy combatants, including Hamdi, have been captured by American and allied forces.

1. The court expresses its appreciation to the Public Defender's Office for the Eastern District of Virginia, the United States Attorney's Office for the Eastern District of Virginia, and the Solicitor General's Office for the professionalism of their efforts throughout these expedited appeals.

The present case arises out of Hamdi's detention by the United States military in Norfolk, Virginia. Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship. He has remained in Norfolk since April 2002.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for writ of habeas corpus, naming as petitioners both Hamdi and himself as next friend.[2] The petition alleged that Hamdi is a citizen of the United States who was residing in Afghanistan when he was seized by the United States government. According to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance." The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" in Afghanistan, transported from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba, in January 2002, and ultimately transferred to the Norfolk Naval Station Brig in Norfolk, Virginia, in April 2002.

Although acknowledging that Hamdi was seized in Afghanistan during a time of active military hostilities, the petition alleges that "as an American citizen, ... Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judicial tribunal, or the right to counsel, "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." By way of relief, the petition asks, inter alia, that the district court: (1) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending"; (2) "Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution"; (3) "To the extent Respondents contest any material factual allegations in th[e] Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody."

On June 11, before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham as counsel for the detainee and ordered the government to allow the Defender unmonitored access to Hamdi. On July 12, we reversed the district court's order granting counsel immediate access to Hamdi. *Hamdi II*, 296 F.3d at 279. We cautioned that Hamdi's petition involved complex and serious national security issues and found that the district court

2. This court has previously determined that Esam Fouad Hamdi is a proper next friend. *Hamdi I*, 294 F.3d at 600 n. 1. Two earlier petitions filed by the Federal Public Defender for the Eastern District of Virginia, Frank Dunham and Christian Peregrim, a private citizen from New Jersey, were dismissed. Neither Dunham nor Peregrim had a significant relationship with the detainee, and Hamdi's father plainly did. *Id.* at 606.

had not shown proper deference to the government's legitimate security and intelligence interests. We did not order the petition dismissed outright, however, noting our reluctance to "embrac[e] [the] sweeping proposition ... that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.* at 283. Rather, we sanctioned a limited and deferential inquiry into Hamdi's status, noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 31, 37, 63 S.Ct. 1, 87 L.Ed. 3 (1942)). We also instructed that, in conducting the inquiry, "the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 284.

Following this remand, the district court held a hearing on July 18. During this hearing, the court expressed its concern over possible violations of Hamdi's rights as an American citizen. The court also questioned the government's most basic contentions regarding the ongoing hostilities, asking "with whom is the war I should suggest that we're fighting?" and "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?" The court directed that "[a]ll of these [answers should] be provided in the answer that the government is to file to the petition" and directed the United States to file such a response to Hamdi's petition by July 25.

On July 25, the government filed a response to, and motion to dismiss, the petition for a writ of habeas corpus. Attached to its response was an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi's petition—specifically, that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant.

In addition to stating that Hamdi has been classified as an enemy combatant, the Mobbs declaration went on further to describe what the government contends were the circumstances surrounding Hamdi's seizure, his transfer to United States custody, and his placement in the Norfolk Naval Brig. According to Mobbs, the military determined that Hamdi "traveled to Afghanistan in approximately July or August of 2001" and proceeded to "affiliate[ ] with a Taliban military unit and receive[ ] weapons training." While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK–47 rifle at the time of surrender. Hamdi was then transported with his unit from Konduz, Afghanistan to the Northern Alliance prison in Mazar-e-Sharif, Afghanistan and, after a prison uprising there, to a prison at Sheberghan, Afghanistan. Hamdi was next transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.

In keeping with our earlier instruction that the district court should proceed cautiously in reviewing military decisions reached during sanctioned military operations, we directed the district court to first "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Following this order, the district court held a hearing on August 13 to review the sufficiency of the Mobbs declaration.

During this hearing, the district court recognized that "the government is entitled to considerable deference in detention decisions during hostilities." The court also noted that it did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." Despite these observations, however, the court asserted that it was "challenging everything in the Mobbs' declaration" and that it intended to "pick it apart" "piece by piece." The court repeatedly referred to information it felt was missing from the declaration, asking "Is there anything in here that said Hamdi ever fired a weapon?" The court questioned whether Mr. Mobbs was even a government employee and intimated that the government was possibly hiding disadvantageous information from the court.

The district court filed an opinion on August 16, finding that the Mobbs declaration "falls far short" of supporting Hamdi's detention. The court ordered the government to turn over, among other things, copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who have questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all of the dates and locations of his subsequent detention.

Upon the Government's motion to certify the August 16 production order for immediate appeal, the district court certified the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?" We then granted the Government's petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b). In so doing, we noted that "this court 'may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.'" *Hamdi v. Rumsfeld*, No. 02-7338 (4th Cir. Sept. 12, 2002) (order granting petition for interlocutory review) (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996)).

II.

Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status—that of American citizen and that of alleged enemy combatant—raises important questions about the role of the courts in times of war.

A.

[1] The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25, 63 S.Ct. 1, 87 L.Ed. 3 (1942). Article I, section 8 grants Congress the power to "provide for the common Defence and general Welfare of the United States ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Cap-

tures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

[2–4] The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin*, 317 U.S. at 26, 63 S.Ct. 1. These powers include the authority to detain those captured in armed struggle. *Hamdi II*, 296 F.3d at 281–82.[3] These powers likewise extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, *see Ludecke v. Watkins*, 335 U.S. 160, 173, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948), and to confiscate or destroy enemy property, *see Juragua Iron Co. v. United States*, 212 U.S. 297, 306, 29 S.Ct. 385, 53 L.Ed. 520 (1909).

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi II*, 296 F.3d at 281.

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the war-making powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

3. Persons captured during wartime are often referred to as "enemy combatants." While the designation of Hamdi as an "enemy combatant" has aroused controversy, the term is one that has been used by the Supreme Court many times. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341, 355, 72 S.Ct. 699, 96 L.Ed. 988 (1952); *In re Yamashita*, 327 U.S. 1, 7, 66 S.Ct. 340, 90 L.Ed. 499 (1946); *Quirin*, 317 U.S. at 31, 63 S.Ct. 1.

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

B.

[5] Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth Amendment is. It applies to American citizens regardless of race, color, or creed. And as we become a more diverse nation, the Bill of Rights may become even more a lens through which we recognize ourselves. To deprive any American citizen of its protections is not a step that any court would casually take.

Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government. Indeed, if due process means anything, it means that the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (internal quotation marks omitted). The Constitution is suffused with concern about how the state will wield its awesome power of forcible restraint. And this preoccupation was not accidental. Our forbears recognized that the power to detain could easily become destructive "if exerted without check or control" by an unrestrained executive free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." 4 W. Blackstone, *Commentaries on the Laws of England* 349–50 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S. 145, 151, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)).

[6, 7] The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120, 18 L.Ed. 281 (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. *See Hamdi II*, 296 F.3d at 283.

[8] It is significant, moreover, that the form of relief sought by Hamdi is a writ of habeas corpus. In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. As early as 1789, Congress reaffirmed the courts' common law authority to review detentions of federal prisoners, giving its explicit blessing to the judiciary's power to "grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment" for federal detainees. Act of

Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81–82. While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

C.

As the foregoing discussion reveals, the tensions within this case are significant. Such circumstances should counsel caution on the part of any court. Given the concerns discussed in the preceding sections, any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y.2002). We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

[9] The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." *Duncan v. Kahanamoku*, 327 U.S. 304, 313–14, 66 S.Ct. 606, 90 L.Ed. 688 (1946) (footnotes omitted). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks. *Hamdi II*, 296 F.3d at 283.

[10] In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front...." *In re Territo*, 156 F.2d 142, 145 (9th Cir.1946). In this respect, "captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, *Military Law and Precedents* 788 (2d ed.1920). And the precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of war.

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. *Hamdi II*, 296 F.3d at 283–84. As the Supreme Court has recognized, "[i]t would be difficult to devise more effective fettering of a

field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).[4]

[11] The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability. To the contrary, the Supreme Court has said that "[i]n adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny ... lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). If anything, separation of powers bears renewed relevance to a struggle whose unforeseeable dangers may demand significant actions to protect untold thousands of American lives.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of warmaking authority conferred by the Constitution and invoked by Congress and the executive branch.

III.

After the district court issued its August 16 production order, it granted respondent's motion for an interlocutory appeal of that order. The following question was certified for our review:

> Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

[12] As the Supreme Court has made clear, we are not limited to this single question. Rather, an appellate court may address any issue fairly included within the certified order, because "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks omitted).

[13] On this appeal, it is argued that Hamdi's detention is invalid even if the government's assertions were entirely accurate. If that were clearly the case, there would be no need for further discovery such as that detailed in the August 16 production order, because Hamdi's detention would be invalid for reasons beyond the scope of any factual dispute. Indeed, any inquiry into the August 16 production order or any discussion of the certified question would be unnecessary, because

4. The government has contended that appointment of counsel for enemy combatants in the absence of charges would interfere with a third detention interest, that of gathering intelligence, by establishing an adversary relationship with the captor from the outset. *See Hamdi II*, 296 F.3d at 282 (expressing concern that the June 11 order of the district court "does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence"). That issue, however, is not presented in this appeal.

neither could suffice to justify a detention that, as a threshold matter, was otherwise unlawful. Moreover, the burden of the August 16 order would necessarily outweigh any benefits if, quite independent of the disputed factual issues, Hamdi were already entitled to relief. *See* Fed. R. Civ. Proc. 26(b)(1)-(2). For that reason, any purely legal challenges to Hamdi's detention are fairly includable within the scope of the certified order. *See Juzwin v. Asbestos Corp.*, 900 F.2d 686, 692 (3d Cir. 1990) (stating that, on § 1292(b) review of an order denying a dispositive motion, an appellate court is "free to consider all grounds advanced in support of the grant of [the motion] and all grounds suggested for sustaining its denial" (internal quotation marks omitted)).

[14] In this vein, Hamdi and amici have in fact pressed two purely legal grounds for relief: 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. We now address them both.[5]

A.

18 U.S.C. § 4001 regulates the detentions of United States citizens. It states in full:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4001 (2002). Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

[15] Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war." 10 U.S.C. § 956(5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons "similar to prisoners of war" without also authorizing their detention in the first instance.

[16] Any alternative construction of these enactments would be fraught with difficulty. As noted above, the detention of enemy combatants serves critical functions. Moreover, it has been clear since at least 1942 that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37, 63 S.Ct. 1. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

It is likewise significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. That statute had provided for the preventive "apprehension and detention" of individuals inside the United States "deemed likely to engage in espionage or sabotage" during "internal security emergencies." H.R. Rep. 92–116, at 2 (Apr. 6, 1971). Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia, "permit[ ] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II." *Id.* There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is. We therefore reject Hamdi's contention that § 4001(a) bars his detention.

B.

[17] Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[18, 19] This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir.1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129–30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing ... grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir.1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2,

5. We reject at the outset one other claim that Hamdi has advanced in abbreviated form. He asserts that our approval of his continued detention means that the writ of habeas corpus has been unconstitutionally suspended. *See* U.S. Const. art. I, § 9. We find this unconvincing; the fact that we have not ordered the relief Hamdi requests is hardly equivalent to a suspension of the writ.

1956, 6 U.S.T. 3516, 75 U.N.T.S. 287); *see also Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C.Cir.1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi provides no reason to conclude that 28 U.S.C. § 2241 makes these diplomatically-focused rights enforceable by a private right of petition. Indeed, it would make little practical sense for § 2241 to have done so, since we would have thereby imposed on the United States a mechanism of enforceability that might not find an analogue in any other nation. This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132. There is a powerful and self-regulating national interest in observing the strictures of the Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance. As the Court in *Eisentrager* observed about the predecessor to the current Geneva Convention, "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n. 14, 70 S.Ct. 936.

[20] Even if Article 5 were somehow self-executing, there are questions about how it would apply to Hamdi's case. In particular, it is anything but clear that the "competent tribunal" which would determine Hamdi's status would be an Article III court. Every country has different tribunals, and there is no indication that the Geneva Convention was intended to impose a single adjudicatory paradigm upon its signatories. Moreover, Hamdi's argument begs the question of what kind of status determination is necessary under Article 5 and how extensive it should be. Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful. *Quirin*, 317 U.S. at 31, 63 S.Ct. 1. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him. The Geneva Convention certainly does not require such treatment.

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order was proper on its own terms.

IV.

[21] As we will discuss below, we conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.

We also note that the order, if enforced, would present formidable practical difficulties. The district court indicated that its production request might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status. The court plainly did not preclude making further production demands upon the government, even suggesting that it might "bring Hamdi before [the court] to inquire about [his] statements."

Although the district court did not have "any doubts [that Hamdi] had a firearm" or that "he went to Afghanistan to be with the Taliban," the court ordered the government to submit to the court for in camera, ex parte review: (1) "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country"; (2) "[a] list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews"; (3) "[c]opies of any statements by members of the Northern Alliance" regarding Hamdi's surrender; (4) "[a] list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention"; (5) "[t]he name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant"; (6) "[t]he name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station"; and (7) "the screening criteria utilized to determine the status of Hamdi." The court's order allows the government to redact "intelligence matters" from its responses, but only to the extent that those intelligence matters are outside the scope of inquiry into Hamdi's legal status.

Hamdi argues vigorously that this order should be affirmed. Because of the alleged "breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants," Br. of the Petitioners/Appellees at 27, Hamdi argues we must allow the district court to subject the government's classification of him to a searching review. While the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, *see* 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case—whether further factual exploration would bring an Article III court into conflict with the warmaking powers of Article I and II. Here, the specific interests asserted by the government flow directly from the warmaking powers and are intimately connected to them. Whatever the general force of these interests (which we discussed extensively above), they are most directly implicated by captures in a zone of active combat operations.

A review of the court's August 16 order reveals the risk of "stand[ing] the warmaking powers of Articles I and II on their heads," *Hamdi II*, 296 F.3d at 284. The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

The district court further ordered the government to produce a list of all interrogators who have questioned Hamdi, including their names and addresses and the dates of the interviews, copies of any statements by members of the Northern Alliance regarding Hamdi's surrender, and a list that includes the date of Hamdi's capture and all the dates and locations of his subsequent detention. Once again, however, litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the matter even further is

the fact that Hamdi was originally captured by Northern Alliance forces, with whom American forces were generally allied. The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime. The court also expressed concern in its order that the Northern Alliance did not "identify the unit [to which Hamdi was affiliated]," "where or by whom [Hamdi] received weapons training or the nature and extent thereof," or "who commanded the unit or the type of garb or uniform Hamdi may have worn. . . ." In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V.

The question remains, however, whether Hamdi's petition must be remanded for further proceedings or dismissed.

Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he is an "enemy combatant" subject to detention during the ongoing hostilities. Thus, as with all habeas actions, we begin by examining the precise allegations presented to us by the respective parties. In this case, there are two allegations that are crucial to our analysis. First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan, a country in which hostilities were authorized and ongoing at the time of the seizure, but that his continued detention in this country without the full panoply of constitutional protections is unlawful. Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detention, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Generally speaking, in order to fulfill our responsibilities under Article III to review a petitioner's allegation that he is being detained by American authorities in violation of the rights afforded him under the United States Constitution, we must first determine the source of the authority for the executive to detain the individual. Once the source of the authority is identified, we then look at the justification given to determine whether it constitutes a legitimate exercise of that authority.

A.

[22, 23] Here the government has identified the source of the authority to detain Hamdi as originating in Article II, Section 2 of the Constitution, wherein the President is given the war power. We have already emphasized that the standard of review of enemy combatant detentions

must be a deferential one when the detainee was captured abroad in a zone of combat operations. The President "is best prepared to exercise the military judgment attending the capture of alleged combatants." *Hamdi II*, 296 F.3d at 283. Thus, in *Quirin*, the Supreme Court stated in no uncertain terms that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25, 63 S.Ct. 1.

[24] This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has voluntarily submitted—and urged us to review—an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

[25] The Mobbs affidavit consists of two pages and nine paragraphs in which Mobbs states that he was "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them." In the affidavit, Mobbs avers that Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK–47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance miliary unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined

previously. We think this inquiry went far beyond the acceptable scope of review.

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency, as the district court attempted to do. The court's approach, however, had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its power to detain under the war powers of Article II. *See Eisentrager*, 339 U.S. at 793, 70 S.Ct. 936 (Black, J., dissenting) ("[I]t is no 'crime' to be a soldier."); *cf. In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (explaining that elevated burden of proof applies in criminal cases because of consequences of conviction, including social stigma). To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.

The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there. The district court, after reviewing the Mobbs affidavit, did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." To delve further into Hamdi's status and capture would require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law.

For these reasons, and because Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. *See Quirin*, 317 U.S. at 25, 63 S.Ct. 1. Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.

B.

[26] We turn then to the question of whether, because he is an American citizen currently detained on American soil by the military, Hamdi can be heard in an Article III court to rebut the factual assertions that were submitted to support the "enemy combatant" designation. We hold that no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.

In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the adjudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has indeed been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 306, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (describing historical practice under which, so long as "there was some evidence to support" a deportation order, habeas courts would not "review factual determinations made by the Executive"); *Eagles v. Samuels*, 329 U.S. 304, 312, 67 S.Ct. 313, 91 L.Ed. 308 (1946); *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 69 L.Ed. 970 (1925). In each of these cases, the Court indicated that the role of the writ is not to correct "mere error" in the executive's exercise of a discretionary power, but rather to check the executive branch if it asserts a "power to act beyond the authority granted." *Eagles*, 329 U.S. at 311–12, 67 S.Ct. 313. Thus, the government asserts, the role of a habeas court is not to reconsider the executive's decision, but rather only to confirm that "there was *some* basis for the challenged executive determination." Br. for Respondents–Appellants at 29. Once that determination is made, the government further asserts, the detainee may not offer any rebuttal evidence and no further factual inquiry is allowed.

It is not necessary for us to decide whether the "some evidence" standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate.

1.

[27–29] As we have emphasized throughout these appeals, we cannot set aside executive decisions to detain enemy combatants "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25, 63 S.Ct. 1. We cannot stress too often the constitutional implications presented on the face of Hamdi's petition. The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual and, were we called upon to delve into it, would likely entail substantial efforts to acquire evidence from distant battle zones. *See Eisentrager*, 339 U.S. at 779, 70 S.Ct. 936. The second question may require fine judgments about whether a particular activity is linked to the war efforts of a hostile power—judgments the executive branch is most competent to make.

Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and Congressional authorization for use of military force in the wake of al Qaida's attack. *Quirin*, 317 U.S. at 25, 63 S.Ct. 1. Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts autho-

rized by Congress and undertaken by the executive branch.

2.

[30] Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.

Indeed, this same issue arose in *Quirin*. In that case, petitioners were German agents who, after the declaration of war between the United States and the German Reich, were trained at a German sabotage school where they "were instructed in the use of explosives and in methods of secret writing." *Quirin*, 317 U.S. at 21, 63 S.Ct. 1. The petitioners then journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices. All of them were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States. All of the petitioners were born in Germany but had lived in the United States at some point. One petitioner claimed American citizenship by virtue of the naturalization of his parents during his youth. The Court, however, did not need to determine his citizenship because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." *Id.* at 37, 63 S.Ct. 1. The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

[31] The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.

3.

[32] Similarly, we reject Hamdi's argument that even if his initial detention in Afghanistan was lawful, his continuing detention on American soil is not. Specifically, Hamdi contends that his petition does not implicate military concerns because "the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas on the basis of caution rather than accuracy." Br. of the Petitioners/Appellees at 44. But the fact that Hamdi is presently being detained in the United States—as opposed to somewhere overseas—does not affect the legal implications of his status as an enemy combatant. For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another. It is not clear why the United States should be precluded from exercising its discretion to move a detainee to a site within this country, nor do we see what purpose would be served by second guessing the military's decision with respect to the locus of detention.

4.

To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

C.

[33] Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." Id. at 53–54. Whether the timing of a cessation of hostilities is justiciable is far from clear. *See Ludecke*, 335 U.S. at 169, 68 S.Ct. 1429 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."). The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. *See United States v. The Three Friends*, 166 U.S. 1, 63, 17 S.Ct. 495, 41 L.Ed. 897 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). In any case, we need not reach this issue here. The government notes that American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.

VI.

It is important to emphasize that we are not placing our imprimatur upon a new day of executive detentions. We earlier rejected the summary embrace of "a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II*, 296 F.3d at 283. But, Hamdi is not "any American citizen alleged to be an enemy combatant" by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.

Cases such as Hamdi's raise serious questions which the courts will continue to treat as such. The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so.

The events of September 11 have left their indelible mark. It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed. It is so ordered.

John Dennis DANIELS, Petitioner-Appellant,

v.

R.C. LEE, Warden, Central Prison, Raleigh, North Carolina, Respondent-Appellee.

No. 02-9.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 29, 2002.

Decided Jan. 10, 2003.

State prisoner filed petition for writ of habeas corpus, challenging conviction of capital murder and resulting death sentence, affirmed at 337 N.C. 243, 446 S.E.2d 298. The United States District Court for the Western District of North Carolina, Graham C. Mullen, Chief Judge, granted summary judgment in favor of state, and denied petitioner's motion for reconsideration. Petitioner sought a certificate of appealability (COA). The Court of Appeals, King, Circuit Judge, held that: (1) petitioner failed to show cause or prejudice to excuse procedural default of claim that prosecutor made a constitutionally defective closing argument to jury during sentencing phase of trial; (2) petitioner's constitutional right to compulsory process was not violated; (3) petitioner's right of self-representation was not infringed; (4) petitioner failed to rebut presumption of correctness as to state court's finding that he was aware of his right to testify at sentencing phase, and that he had waived that right; (5) petitioner was not denied effective assistance of counsel; and (6) petitioner failed to make a substantial showing of the denial of a constitutional right, as required to obtain a COA.

Certificate of appealability denied.

1. Habeas Corpus ⇐442

Even if the state court's determination that there is no constitutional error was "contrary to" or "an unreasonable application of" Supreme Court precedent, federal courts are not permitted to grant habeas corpus relief unless they are convinced that the error had a substantial and injurious effect or influence in determining the jury's verdict. 28 U.S.C.A. § 2254(d)(2).

2. Habeas Corpus ⇐818

To make a substantial showing of the denial of a constitutional right, as required to obtain a certificate of appealability (COA), a habeas petitioner must demon-

University of Scranton, 700 A.2d 979, 988 (Pa.Super.Ct.1997); *Corrigan v. Methodist Hosp.*, 853 F.Supp. 832, 837 (E.D.Pa.1994) (applying Pennsylvania law). Plaintiff has failed to show any intent to injure Mrs. Labelle on the part of Philip Morris, and therefore summary judgment is proper as to Plaintiff's civil conspiracy claim. *See Corrigan*, 853 F.Supp. at 837 (holding that requisite malice cannot be inferred from the mere fact that defendants stood to gain financially from their allegedly harmful and illegal actions).

IV. CONCLUSION

It is, therefore.

ORDERED, for the foregoing reasons that Defendant Philip Morris' Motion for Summary Judgment is **GRANTED** as to all of Plaintiff's claims.

AND IT IS SO ORDERED.

Yaser Esam HAMDI, and Esam Fouad Hamdi, As Next Friend of Yaser Esam Hamdi, Petitioners,

v.

Donald RUMSFELD, and Commander W.R. Paulette, Respondents.

No. 2:02-CV-439.

United States District Court, E.D. Virginia, Norfolk Division.

Aug. 16, 2002.

Father of military detainee, who was American citizen captured as alleged enemy combatant during military operations in Afghanistan, petitioned as next friend for writ of habeas corpus. The United States District Court for the Eastern District of Virginia appointed counsel and ordered government to allow counsel unmonitored access to detainee. Government appealed. The Court of Appeals, 296 F.3d 278, reversed and remanded. On remand, the District Court, Doumar, Senior District Judge, held that: (1) detainee was entitled to due process of law, and (2) government's declaration was insufficient, standing alone, to establish that continuing military detention did not violate detainee's due process rights.

Ordered accordingly.

Order reversed, 316 F.3d 450.

1. Constitutional Law ⇐72

Deference afforded by judiciary to the President of the United States when exercising his authority as Commander in Chief is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations, and extends to military designations of individuals as enemy combatants.

2. Constitutional Law ⇐72

Although the President of the United States is entitled to deference regarding military designations of individuals made pursuant to the President's exercise of authority as Commander in Chief, the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens.

3. Constitutional Law ⇐252

Military detainee, who was American citizen captured as alleged enemy combatant during military operations in Afghanistan, was entitled to due process of law pursuant to Fifth Amendment. U.S.C.A. Const.Amend. 5.

4. Constitutional Law ⇐255(2)
War and National Emergency ⇐11

Declaration submitted by government was insufficient, standing alone, to establish that government's continuing military detention of American citizen who was captured as alleged enemy combatant during military operations in Afghanistan, and who was being held indefinitely, on United States soil, in solitary confinement, and without access to counsel, did not violate detainee's due process rights; declaration did not address declarant's authority to conduct review and make declarations on government's behalf regarding detainee's classification as enemy combatant, permit determination as to constitutionality of screening criteria used in classifying detainee and making transfer decisions respecting detainee, or adequately establish factual basis underlying classification determination. U.S.C.A. Const.Amend. 5.

5. Arrest ⇐70(2)

Confinement for 48 hours triggers arrestee's right to a preliminary hearing.

Larry W. Shelton, Office of the Federal Public Defender, Norfolk, VA, Frank W. Dunham, Jr., Office of the Public Defender, Richmond, VA, for Yaser Esam Hamdi.

Esam Fouad Hamdi, Jubail, Saudi Arabia, pro se.

Lawrence Richard Leonard, Office of United States Attorney, Norfolk, VA, Gregory George Garre, U.S. Department of Justice Office of the Solicitor General, Washington, DC, for Respondent.

ORDER

DOUMAR, District Judge.

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp.Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing...with no *meaningful judicial review*, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir.2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, *ex parte*, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.

Background

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria" [1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in

1. The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria *ex parte* and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n. 1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir.2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at 282. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 280. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at 281. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 282–3.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 280.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

Discussion

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997)(hereinafter Joint Service Regulation). These regulations "provide[ ] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." *Id.* at 1. The exact legal force of these regulations is not now determined, but the regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." *Id.* It specifically lists the GPW as one of the relevant treaties in its determination of international law. *Id.* At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

[1] The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi v. Rumsfeld*, at 282. The Supreme Court has made it clear that the President is afforded deference when exercising his authority as Commander in Chief. *Ex parte Quirin*, 317 U.S. 1, 28–29, 63 S.Ct. 1, 87 L.Ed. 3 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (2001). This deference extends to military designations of individuals as enemy combatants. *Hamdi v. Rumsfeld*, 296 F.3d at 282.

2. The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. *See* Joint Service Regulation 1–6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee—Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.")(the GPW does not allude to general courts-martial convening authority).

[2] While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." *Id.* at 282. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart . . . It would indeed by ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

[3] The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet.Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the *Quirin* case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in *Ex parte Quirin* that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. *Id.* It is apparent that the defendant in *Quirin* to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

[4] The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

[5] The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes,

3. Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

4. Confinement for 48 hours triggers the right to a preliminary hearing. *Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." *Id.* The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." *Id.* Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." *Id.* (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

5. Did someone give him a weapon and say "here's the safety and there's the trigger?"

6. This doesn't sound like he was expected to fight or escape.

7. The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.

Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. *Id.* at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. *Id.* There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." *Id.* It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

8. Disobedience of regulations generally results in discipline actions.

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

SHOOTING POINT, L.L.C., et al., Plaintiffs,

v.

W.M. CUMMING, Jr., John W. Wescoat, Suzanne Wescoat, John W. Wescoat, Jr., and Curtis H. Jones, Jr., Defendants.

No. 2:02CV193.

United States District Court, E.D. Virginia, Norfolk Division.

Jan. 30, 2003.

Landowners sued adjoining landowners and engineer for state department of transportation under § 1983, alleging violations of their federal and constitutional rights. The District Court, 238 F.Supp.2d 729, dismissed action. On plaintiffs' motion for clarification, the District Court, Rebecca Beach Smith, J., held that plaintiffs failed to allege any abridgement of their federally-protected rights, as required to support claim for civil conspiracy under § 1983.

Ordered accordingly.

1. **Conspiracy** ⇐7.5(1)

To state claim for civil conspiracy under § 1983, plaintiff must make something more than naked assertion of conspiracy between state actor and private parties; plaintiff must show that defendants acted jointly in concert and that some overt act was done in furtherance of conspiracy which resulted in deprivation of constitutional right. 42 U.S.C.A. § 1983.

2. **Conspiracy** ⇐7.5(1)

Gist of cause of action for civil conspiracy under § 1983 is deprivation of plaintiff's constitutional right, and not the conspiracy. 42 U.S.C.A. § 1983.

United States Court of Appeals, Fourth Circuit.

Yaser Esam HAMDI; Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi, Petitioners-Appellees,

v.

Donald RUMSFELD; W.R. Paulette, Commander, Respondents-Appellants.

Ruth Wedgwood, Professor of Law, Yale University Law School, and Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University; Samuel Estreicher, Professor of Law, New York University School of Law; Ronald Rotunda, George Mason University Foundation Professor of Law, George Mason University School of Law; Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, Catholic University; David B. Rivkin, Jr.; Lee A. Casey; Darin R. Bartram; Amici Curiae in support of Appellants.

Center For Constitutional Rights; Richard L. Abel, Connell Professor of Law, University of California at Los Angeles; William J. Aceves, Professor of Law, California Western School of Law; Bruce A. Ackerman, Sterling Professor of Law & Political Science, Yale University; Lee A. Albert, Professor of Law, University at Buffalo Law School, The State University of New York; Barbara Bader Aldave, Loran L. Stewart, Professor of Corporate Law, University of Oregon School of Law; Alicia Alvarez, Clinical Associate Professor of Law, DePaul University School of Law; Diane Marie Amann, Professor of Law, University of California, Davis, School of Law; Michelle J. Anderson, Associate Professor of Law, Villanova University School of Law; Fran Ansley, Professor of Law, University of Tennessee College of Law; Elvia R. Arriola, Associate Professor of Law, Northern Illinois University College of Law; Frank Askin, Professor of Law and Robert Knowlton Scholar, Rutgers School of Law at Newark; Milner S. Ball, Caldwell Professor of Constitutional Law, University of Georgia School of Law; Jon Bauer, Clinical Professor of Law and Director, Asylum & Human Rights Clinic University of Connecticut School of Law; Paul Schiff Berman, Associate Professor, University of Connecticut School of Law; Cynthia Bowman, Professor of Law, Northwestern University School of Law; Mark S. Brodin, Professor of Law, Boston College Law School; Bartram S. Brown, Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; Sue Bryant, Director of Clinical Education and Associate Professor of Law, CUNY School of Law; Burton Caine, Professor of Law, Temple University School of Law; Emily Calhoun, Professor of Law, University of Colorado School of Law; Anupam Chander, Acting Professor of Law, University of California, Davis, School of Law; Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School; Paul G. Chevigny, Joel S. and Anne B. Ehrenkranz Professor of Law, New York University Law School; Paul Chill, Clinical Professor of Law, University of Connecticut School of Law; Gabriel J. Chin, Rufus King Professor of Law, University of Cincinnati College of Law; Carol Chomsky, Associate Professor of Law, University of Minnesota Law School; Margaret Chon, Associate Professor of Law, Seattle University School of Law; Marjorie Cohn, Associate Professor of Law, Thomas Jefferson School of Law, San Diego; Robin Morris Collin, Professor of Law, University of Oregon School of Law; Dennis E. Curtis, Clinical Professor of Law, Yale Law School; Erin Daly, Associate Professor of Law, Widener University; Michael H. Davis, Professor of Law, Cleveland State University; Michael Deutsch, Adjunct Professor of Law, Northwestern University School of Law; Laura Dickinson, Associate Professor, University of Connecticut School of Law; Robert Dinerstein, Associate Dean and Professor of Law, American University, Washington College of Law; Jane Dolkart, Associate Professor of Law, Dedman School of Law, Southern Methodist University; Sharon Dolovich, Acting Professor of Law, University of California at Los Angeles; Douglas L. Donoho, Professor of Law, Nova Southeastern University,

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Shepard Broad Law Center; Dolores Donovan, Professor of Law, University of San Francisco School of Law; Mary L. Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School; Visiting Research Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University; Pamela Edwards, Assistant Professor of Law, CUNY School of Law; Nancy Ehrenreich, Associate Professor of Law, University of Denver College of Law; Rosa Ehrenreich Brooks, Associate Professor of Law, University of Virginia School of Law; J. Soffiyah Elijah, Clinical Instructor, Criminal Justice Institute, Harvard Law School; Susan J. Feathers, Esq., Director, Public Service Program, University of Pennsylvania Law School; Marvin Fein, Associate Professor, University of Pittsburgh School of Law; Todd D. Fernow, Professor of Law, Director, Criminal Clinic, University of Connecticut School of Law; Sally Frank, Professor of Law, Drake University School of Law; Katherine Franke, Professor of Law, Columbia University; Eric M. Freedman, Professor of Law, Hofstra University School of Law; Niels W. Frenzen, Clinical Assistant Professor of Law, University of Southern California; Craig B. Futterman, Assistant Clinical Professor of Law, University of Chicago Law School; Kristin Booth Glen, Dean and Professor of Law, CUNY School of Law; Brian Glick, Associate Clinical Professor of Law, Fordham Law School; Howard A. Glickstein, Dean and Professor of Law, Touro Law School; Phyllis Goldfarb, Professor of Law, Boston College Law School; Bob Golten, Director, International Human Rights Advocacy Center, University of Denver; Carlos E. Gonzalez, Associate Professor of Law, Rutgers School of Law--Newark; Visiting Associate Professor of Law, Santa Clara University School of Law; Kenneth W. Graham, Jr., Professor of Law, University of California at Los Angeles; Ariela Gross, Professor of Law & History, The Law School, University of Southern California; Louise Halper, Professor of Law, Washington & Lee University School of Law; Joel F. Handler, Richard C. Maxwell Professor of Law and Professor of Policy Studies, School of Public Policy and Social Research, University of California at Los Angeles; Sidney L. Harring, Professor of Law, CUNY Law School; Virginia Hench, Associate Professor of Criminal Law & Procedure & Civil Rights, University of Hawaii--Manoa; Kathy Hessler, Professor, Case Western Reserve University School of Law; Judith L. Holmes, Assistant Professor of Legal Studies, University of Massachusetts--Amherst; Wythe W. Holt, Jr., University Research Professor of Law, University of Alabama School of Law; Joan Howarth, Professor of Law, University of Nevada, Las Vegas; Marsha Huie, Professor of Law, The University of Tulsa College of Law; Eric S. Janus, Professor of Law, William Mitchell College of Law; Paula C. Johnson, Associate Professor of Law, Syracuse University College of Law; Jose R. Juarez, Jr., Professor of Law, St. Mary's University School of Law; David Kairys, James E. Beasley Professor of Law, Beasley School of Law, Temple University; Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, University of Michigan; Jerry Kang, Professor of Law, University of California at Los Angeles; Lewis R. Katz, John C. Hutchins Professor of Law, Case Western Reserve University Law School; Eileen Kaufman, Professor of Law, Touro Law School; Michael J. Kelly, Assistant Professor, Creighton University School of Law; Raneta Lawson Mack, Professor of Law, Creighton University School of Law; David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles; John Leubsdorf, Professor of Law, Rutgers Law School-Newark; Martin L. Levy, Professor, Thurgood Marshall School of Law, Texas Southern University; Jules Lobel, Professor of Law, University of Pittsburgh Law School; David Luban, Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center; Beth Lyon, Assistant Professor of Law, Villanova University School of Law; Holly Maguigan, Professor of Clinical Law, New York University School of Law; Samuel A. Marcosson, Associate Professor, Louis D. Brandeis School of Law, University of Louisville; Gary M. Maveal, Associate Professor of Law, University of Detroit Mercy School of Law; Robert F. Meagher, Emeritus

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Professor, Fletcher School of Law and Diplomacy, Tufts University; Carlin Meyer, Professor of Law, New York Law School; Jonathan M. Miller, Professor of Law, Southwestern University School of Law; Margaret E. Montoya, Professor of Law, University of New Mexico School of Law; Beverly Moran, Professor of Law, Professor of Sociology, Vanderbilt University School of Law; David A. Moran, Assistant Professor of Law, Wayne State University Law School; Mary-Beth Moylan, Instructor of Law, University of the Pacific, McGeorge School of Law; Millard A. Murphy, Esq., Clinical Instructor, Prison Law Clinic, University of California, Davis, School of Law; Kenneth B. Nunn, Professor of Law, Fredric G. Levin College of Law, University of Florida; James P. Ogilvy, Associate Professor of Law, Columbus School of Law, The Catholic University of America; Nancy K. Ota, Professor of Law, Albany Law School; Marc R. Poirier, Professor of Law, Seton Hall Law School; James Pope, Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law; Deborah W. Post, Professor of Law, Touro Law School; William Quigley, Professor of Law and Director of the Loyola Law Clinic & the Gillis Long Poverty Law Center, Loyola Law School; Margaret Jane Radin, Wm. Benjamin Scott and Luna M. Scott Professor of Law, Stanford Law School; Martha Rayner, Associate Clinical Professor of Law, Fordham University School of Law; Judith Resnick, Arthur Liman Professor of Law, Yale Law School; Paula R. Rhodes, Associate Professor of Law, Director, LLM in American and Comparative Law Program, University of Denver College of Law; Henry J. Richardson, III, Peter J. Liacouras Professor of Law, Temple Law School; Annelise Riles, Professor of Law and Professor of Anthropology, Cornell University; Toni Robinson, Professor of Law, Quinnipiac School of Law; Florence Wagman Roisman, Professor of Law and Paul Beam Fellow, Indiana University School of Law-Indianapolis; Kermit Roosevelt, Assistant Professor, University of Pennsylvania Law School; Tanina Rostain, Associate Professor, New York Law School; Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale University; David Rudovsky, Senior Fellow, University of Pennsylvania Law School; Leila Nadya Sadat, Professor of Law, Washington University in St. Louis; Natsu Taylor Saito, Professor of Law, Georgia State University College of Law; Robert F. Seibel, Professor of Law, CUNY Law School; Franklin Siegel, City University of New York School of Law; Robert A. Sedler, Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties, Wayne State University; Marci Seville, Associate Professor of Law and Director, Women's Employment Rights Clinic, Golden Gate University School of Law; Marjorie Silver, Professor, Touro Law Center; Eileen Silverstein, Zephaniah Swift Professor of Law, University of Connecticut; David Sloss, Assistant Professor of Law, Saint Louis University School of Law; Ronald C. Slye, Associate Professor, Seattle University School of Law; Lloyd B. Snyder, Professor of Law, Cleveland State University; Andrej Thomas Starkis, Assistant Professor of Law, Massachusetts School of Law; Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law; Joan Steinman, Distinguished Professor of Law, Chicago-Kent College of Law; Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law; Robert L. Tsai, Assistant Professor of Law, University of Oregon School of Law; Beth Van Schaack, Assistant Professor, Santa Clara University School of Law; Deborah M. Weissman, Associate Professor of Law and Director of Clinical Programs, University of North Carolina School of Law; Charles E. Wilson, Associate Professor of Law, The Ohio State University College of Law; Richard J. Wilson, Professor, Washington College of Law, American University; Adam Winkler, Acting Professor of Law, University of California at Los Angeles; Stephen Wizner, William O. Douglas Clinical Professor of Law and Supervising Attorney, Yale Law School; Mark E. Wojcik, Associate Professor of Law, The John Marshall Law School, Chicago; Frank H. Wu, Professor of Law, Howard University; Cliff Zimmerman, Clinical Associate Professor of Law, Northwestern University; National Lawyers' Guild, Heidi Boghosian, Executive Director; National Immigration Project Of The

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National Lawyers Guild, Dan Kesselbrenner, Executive Director; National Lawyers Guild New York Chapter, Dana Biberman, President; Human Rights Watch, James Ross, Senior Legal Counsel; Southern Poverty Law Center, Rhonda Brownstein, Legal Director; Unitarian Universalist Service Committee, Denise Moorehead, Deputy Director of Program; Puerto Rico Legal Defense and Education Fund, Incorporated, Foster Maer, Acting Legal Director; National Coalition to Protect Political Freedom, Kit Gage, President; First Amendment Foundation, Kit Gage, Director; National Lawyer's Guild/Maurice & Jane Sugar Law Center for Economic & Social Justice, Julie Hurwitz, Executive Director; Civil Liberties Monitoring Project, Jared Rossman, President; Association of Legal Aid Attorneys, U.A.W. Local 2325, Michael Letwin, Esq., President; Partnership for Civil Justice, Mara Verheyden-Hilliard, co-founder; Trial Lawyers for Public Justice, Rebecca Epstein, Staff Attorney; Freedom Socialist Party, Val Carlson; Jewish Alliance for Law and Social Action, Andrew M. Fischer; The Innocence Project at the Benjamin N. Cardozo School of Law, Nina Morrison, Esq., Executive Director; Ella Baker Center for Human Rights, Van Jones, National Executive Director; American Friends Service Committee, Mary Ellen McNish, General Secretary; Reber Boult, Esq., Albuquerque, New Mexico; Hunter Gray; John Mage, Esq., New York, New York; Douglas N. Masters, Esq., Chicago, Illinois; Laura Beth Nielsen, Research Fellow, American Bar Foundation; Leonard Weinglass, Esq., New York, New York; Camille Whitworth, Esq., Austin, Texas; Mitchell Zimmerman, Esq., Co-Coordinator, Law Professors for the Rule of Law; National Association of Criminal Defense Lawyers; American Civil Liberties Union Foundation; ACLU Foundation of Virginia, Amici Curiae in support of Appellees.

No. 02-7338.

Filed: July 9, 2003.

ORDER

Appellees filed a petition for rehearing and suggestion for rehearing en banc.

The panel voted to deny panel rehearing.

A member of the Court requested a poll on the petition for rehearing en banc, and a majority of the judges in active service voted to deny rehearing en banc. Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc. Chief Judge Wilkins, and Judges Widener, Wilkinson, Niemeyer, Williams, Michael, Traxler, and Shedd voted to deny rehearing en banc.

Judge Wilkinson filed an opinion, concurring in the denial of rehearing en banc. Judge Traxler filed an opinion, concurring in the denial of rehearing en banc. Judge Luttig filed an opinion, dissenting from the denial of rehearing en banc. Judge Motz filed an opinion, dissenting from the denial of rehearing en banc.

***341** The Court denies the petition for rehearing and suggestion for rehearing en banc. The mandate shall issue forthwith.

Entered at the direction of Judge Wilkinson for the Court.

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the denial of the rehearing en banc. The panel opinion written by Chief Judge Wilkins, Judge Traxler, and myself has already properly resolved this case. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003). I thus offer only these few comments in response to the dissent of my good colleague Judge Motz.

Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about that. The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief. Art. II, Sec. II. And the question is essentially whether the United States can capture and detain prisoners of war without subjecting the factual circumstances surrounding foreign battlefield seizures to extensive in-court review. [FN1] The answer to this is now--and always has been--yes. In giving prisoners of war the right to litigate their detentions in American courts, the dissent would install a more restrictive regime on the executive branch after September 11 than existed before. I regret that my colleague does not even quote the provisions of Article I and Article II which delegate the conduct of war to the coordinate branches of our

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government. For the course on which my dissenting colleague is embarked will trespass, increment by increment, upon those powers, to the detriment of the judiciary's own obligation to respect the proper limits and boundaries of its role.

FN1. The government does not concede that Hamdi is a prisoner of war, but rather asserts that he is an unlawful combatant. For the purposes of this case, the distinction is irrelevant because the decision to detain until the cessation of hostilities belongs to the executive in either case. *See Hamdi*, 316 F.3d at 469.

The panel earlier expressed doubt that the timing of a cessation of hostilities was even justiciable. *Hamdi v. Rumsfeld*, 316 F.3d at 476 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 169, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.")). It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat and when the status of combatants, their terms of release, and the mutuality of exchanges may all remain subjects for negotiation and diplomacy. *See Ludecke*, 335 U.S. at 169, 68 S.Ct. 1429; *The Three Friends*, 166 U.S. 1, 63, 17 S.Ct. 495, 41 L.Ed. 897 (1897); *The Prize Cases*, 67 U.S. 635, 670, 2 Black 635, 17 L.Ed. 459 (1862).

To claim, as my colleague does here, that there was no meaningful judicial review of Hamdi's detention is incorrect. There was extensive review of every legal challenge to Hamdi's detention. The dissent wishes to proceed further and litigate precisely why petitioner was seized and whether the military capture can be justified. The conduct of war, however, involves innumerable discretionary decisions made by our armed forces in the field every day. Many of them have life or death consequences. To subject these discretionary decisions made in the course of foreign combat operations to the prospect of domestic litigation would be an unprecedented step. Doing so would ignore the fundamentals of Article I and II--namely that they entrust to our armed forces the capacity to make the necessary and traditional ***342** judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war. *See The Prize Cases*, 67 U.S. 635, 670, 2 Black 635, 17 L.Ed. 459 (1862).

Hamdi's own filings make clear that he was seized in a zone of active combat operations. Hamdi's petition notes that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." *See* Petition for Habeas Corpus, p. 2. In their traverse, petitioners state that the petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." *See* Traverse and Response to Respondent's Motion to Dismiss, p. 2. And outside the legal arena, petitioner Esam Fouad Hamdi, in a letter to Senator Patrick J. Leahy, stated that they were "not challenging the battlefield determination, decision to detain individuals in the theater of combat." *See* Letter to Senator Patrick J. Leahy, August 5, 2002. Even the district court, while ordering a more intrusive examination of the circumstances of Hamdi's capture, noted that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge." *See* Order of August 16, 2002, p. 8. [FN2] Our review of the petition was undertaken in light of this undisputed fact.

FN2. The above submissions were repeatedly reinforced by Hamdi's counsel in open court. *See, e.g.*, "Hamdi[,] as far as I know, is the only [American citizen] out of all the detainees that were gathered up on the battlefield in Afghanistan." (Tr. of Oct. 28, 2000 oral argument at 37); Hamdi's counsel describing as "correct" the district judge's statement that "this man was in a fighting situation.... He was where the fight was." (Tr. of Aug. 13, 2002 district court proceedings at 70-71). Indeed, as Judge Traxler's thoughtful opinion indicates, the record is replete with admissions that Hamdi was captured in Afghanistan during hostilities, references that are fully consistent with the panel opinion and that make the locus of Hamdi's seizure susceptible to little more than metaphysical doubt. The fact that the panel may not have specifically quoted all such references in its opinion in no way implies that it rejected their validity.

The dissent makes the contention that Hamdi's father as next friend is incapable of making representations on Hamdi's behalf. *Post* at 371. But the cases my colleague cites in no way involved the constitutional principles implicated by a foreign battlefield capture. *See White v. Miller*, 158 U.S. 128, 15 S.Ct. 788, 39 L.Ed. 921 (1895); *Kingsbury v.*

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Buckner, 134 U.S. 650, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir.1940). In seeking to deny effect to the filings of the next friend in this case, the dissent's approach would abrogate yet once again the separation of powers by endowing those deemed enemy combatants with rights comparable to those enjoyed by ordinary civil or criminal litigants. And in decrying this reasoning as "dizzyingly circular", *see post* at 371 n.1, the dissent again makes clear that nothing less than a full judicial exploration of the circumstances of petitioner's capture will suffice.

With respect, the dissent's demand for further factual inquiries raises many more questions than it answers. The dissent notes vaguely that it wants a non-hearsay basis for petitioner's detention and that the Mobbs Declaration must be probed for every incompleteness or inconsistency. *Post* at 368. While the dissent appears to acknowledge that the district court production order went too far, its specific criticisms of the Mobbs Declaration suggest otherwise. This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.

The dissent declines to acknowledge the perils in its path, and we are left to guess at how it would proceed. Opposing affidavits would not likely satisfy the dissent, for they would leave the court to weigh one ***343** protestation against the other with little means of doing so. *Ex parte, in camera* review would set disputes in motion over the scope of redaction and create a whole new set of secrecy issues surrounding Hamdi's case. *Ex parte, in camera* submissions would likely please no one--neither the government required to hand over potentially sensitive materials, nor Hamdi who would be denied the chance to contest an *ex parte* review of them, nor the public who would be left in the dark about the real basis for resolving Hamdi's case. My dissenting colleague also laments the absence of "first-hand knowledge of Hamdi's conduct or status in Afghanistan." *See post* at 373. The dissent is plainly unwilling to trust the judgment of those actually fighting the war that Hamdi was properly seized. What further steps should the judiciary then be prepared to take? What kind of hearings? What role for counsel? What kind of showings? What sort of witnesses? The district court struggled with these questions to ill effect. *See Hamdi*, 316 F.3d at 470-71; *Hamdi v. Rumsfeld*, 243 F.Supp.2d 527 (E.D.Va.2002).

My colleague's desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success--its planning, tactics, and intelligence--are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field. At a minimum, if rules are to be prescribed for litigating something as sensitive as the soundness of battlefield detentions in Article III courts, then the prescription should come from Congress or the Executive--the branches of government charged by our Constitution with the conduct of foreign war. I cannot conceive of the courts on their own motion--without the considered input of the political branches--devising a set of procedures allowing prisoners of war to hold American commanders accountable in federal court. If any illustration of the difficulties and hazards of such a judicial enterprise were needed, the history of Hamdi's case should more than suffice.

My colleague also interprets a series of World War II-era Supreme Court cases as invitations for the judiciary to involve itself in an exacting review of decisions made on foreign battlefields. *Post* at 369-371. My colleague's overreading of these decisions misses their fundamental import: they are replete with warnings that the judiciary must stay its hand when reviewing an exercise of the Commander-in-Chief powers during wartime. *Ex parte Quirin*, for example, holds without reservation that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict ***344** with the Constitution or laws of Congress constitutionally enacted." 317 U.S. 1, 25, 63 S.Ct. 2, 87 L.Ed. 3 (1942). Likewise, *Johnson v. Eisentrager* emphasized that "[e]xecutive power over enemy aliens"--the enemy combatants at issue in that case--"undelayed and unhampered by litigation, has been deemed, throughout

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our history, essential to war-time security." 339 U.S. 763, 774, 70 S.Ct. 936, 94 L.Ed. 1255 (1950); *see also id.* at 778-79, 70 S.Ct. 936 (detailing the crippling complications that would arise from allowing searching judicial review of the petitioners' detention). And *In re Yamashita* noted that the military tribunals challenged in that case were "not subject to judicial review merely because they have made a wrong decision on disputed facts." 327 U.S. 1, 8, 66 S.Ct. 340, 90 L.Ed. 499 (1946). "Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined." *Ludecke v. Watkins*, 335 U.S. 160, 172, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948). These cases are caution signals to the judiciary, not green lights.

I seriously doubt that any mistake was made in Hamdi's case. But the Supreme Court in *Ex parte Quirin*, *Johnson v. Eisentrager*, and *In re Yamashita* was fully aware that war was a messy business, that mistakes could be made, but that close judicial review was nonetheless costly and constitutionally proscribed. And the panel in this case did not seek to move further than the precise case before it. *See Hamdi*, 316 F.3d at 465. To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges. Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present. There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

Finally, although both the panel opinion and the dissent have noted the evidentiary shortcomings of the Mobbs Declaration, there is a value to having the United States state under oath its reasons for the detention of an American citizen, even one captured during the course of armed combat. [FN3] To go further, however, would be folly. It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith. It diminishes these interests to inquire whether the judiciary deems them "legitimate," "substantial," or "compelling," for they are grounded in the wording of Articles I and II themselves. The ***345** federal judiciary plays a vital role in securing our rights. But the other branches of government also play their part in securing the blessings of our liberty. In this case, the paramount right is that of the citizens of our country to have their democracy's most vital, life-or-death decisions made by those whom the Constitution charges with that task.

FN3. My colleague Judge Luttig's dissent attempts to straddle the issue by taking sides with both parties. On the one hand, it asserts that "the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant." *Post* at 358. On the other hand, it argues that it is likely that "the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard." *Post* at 367. In all events, the panel had before it the straightforward situation where petitioners' filings repeatedly corroborated the government's assertions that the locus of Hamdi's capture was a zone of active combat operations abroad. Unsurprisingly, the panel addressed the case on the basis of what was before it.

In sum, this petition was properly dismissed.

TRAXLER, Circuit Judge, concurring in the denial of rehearing en banc:

In their dissents from the denial of rehearing, my colleagues have appreciated the nature and magnitude of the competing interests at stake here. However, because I believe that their opinions at times have unfairly and inaccurately characterized the panel opinion, I regrettably find myself drawn to offer a few comments in response. [FN1]

FN1. Because Judge Wilkinson has already written eloquently, and primarily, in response to Judge Motz's dissent, I focus my comments chiefly on matters raised by Judge Luttig.

I.

Each of my dissenting colleagues argues that the panel erred in premising its decision on the "admission" that Yaser Esam Hamdi was captured within the boundaries of Afghanistan. Judge Luttig questions whether any such admission was made, at least in the petition, and Judge Luttig and Judge Motz both believe that any such admission should be ineffective because it was made by Hamdi's father, Esam Fouad Hamdi, acting as Yaser Esam Hamdi's "next friend," and not directly by Yaser

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Esam Hamdi.

A.

I begin with Judge Luttig's charge that the panel opinion "is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as 'undisputed' " because they were not, in his view, "conceded in fact." As an initial premise, I would point out that the panel decision does not characterize *all* the circumstances of Hamdi's seizure as being undisputed. Rather, it characterizes *one* circumstance of Hamdi's seizure as undisputed--his presence in Afghanistan while active military operations were being waged by the United States military against the governing Taliban regime. Hamdi's reason for being in Afghanistan at the time he was seized and the question as to whether he was indeed actively engaged as an enemy to our forces and this country are very much in dispute. The government asserts that Hamdi was in Afghanistan bearing arms as a Taliban soldier when he was seized; Hamdi's father asserts that Hamdi was only temporarily residing in Afghanistan while engaged in relief work when he was apprehended. Thus, the panel opinion's observation is in reality limited to the simple fact that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Hamdi*, 316 F.3d at 459. [FN2]

FN2. *See also Hamdi*, 316 F.3d at 460 (noting that the petitioner "acknowledg[ed] that Hamdi *was seized in Afghanistan* during a time of active military hostilities") (emphasis added); *id.* at 461 (noting that it was "undisputed that Hamdi *was captured in Afghanistan* during a time of armed hostilities there") (emphasis added); *id.* at 474 (noting that "Hamdi's petition *places him* squarely within the zone of active combat") (emphasis added); *id.* at 476 (noting that "it is undisputed that [Hamdi] was captured in a zone of active combat operations").

As to this more narrow point of disagreement, Judge Luttig correctly observes ***346** that the habeas petition does not *explicitly* state that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Id.* However, from this single pleading omission, Judge Luttig inexplicably leaps to the conclusion that the remaining petition allegations are ambiguous on the question (or, worse, that we should ignore them) and, even more inexplicably, to the belief that when responding to a dissent to a denial for rehearing en banc, the panel has somehow forfeited a right to point to any other pleading or representation filed or otherwise made *by the petitioner* that supports the observation, unremarkable when made, that Hamdi was indeed in Afghanistan when captured.

First, the petition's failure to affirmatively state that Hamdi was captured in a foreign combat zone did not and still does not compel me to ignore the other allegations that are present, nor does it cause me to consider that the place of Hamdi's capture is a matter of dispute. As Judge Wilkinson has pointed out, the petition alleges that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." J.A. 9. [FN3] Were this the only allegation made, I suppose I could speculate about whether Hamdi had traveled from his "reside[nce] in Afghanistan" to another country "when [and where he was] seized by the United States Government," but I need not do so. *Id.* Significantly, the one statement quoted above is not the only allegation made; the petition provides a great deal more information than that. It avers that, following the terrorist attacks on September 11, 2001, "the United States initiated military action against the Taliban Government in Afghanistan," and that, "in the course of the military campaign, ..., the United States provided military assistance to the Northern Alliance." J.A. 10. As a result of this military assistance in Afghanistan, the petition states that

> the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. It goes on to allege that "[o]n or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba," and that on or about that same date, "the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay." J.A. 11.

When we authored the panel opinion, I did not consider these petition allegations to be ambiguous, nor do I today. A plain reading of the submission to us made clear that Esam Fouad Hamdi, as next friend to Yaser Esam Hamdi and as his father, based his claims in large part on the fact that Yaser was seized in Afghanistan in the course of the United States military operations within that country. His contention was that the United States military should release Yaser because he was not in Afghanistan to fight us or our allies and, therefore, was not *properly* being held as an "enemy

FN3. According to later representations made by his father, Hamdi left "Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," and became "trapped in Afghanistan once the military campaign began." J.A. 153.

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combatant" by our military forces.

There was not then and there is not now any reason to be troubled by the lack of an *explicit* allegation in the petition that Hamdi was seized in a zone of active combat in a foreign theater of conflict, because any possible question about whether the petition was incomplete or uncertain in its intent to allege that Hamdi was actually ***347** one of the prisoners captured and detained in Afghanistan would have been eliminated by Hamdi's Traverse and Response to the government's motion to dismiss, in which the petitioner engages in his own characterization of the substance of the factual allegations and the claims contained within the petition.

There, the petitioner unequivocally represents that the "claim [does not] implicate Respondents' initial detention of Petitioner Hamdi *in Afghanistan*," but "challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia" and that, because petitioner did not contest the initial detention of Hamdi in Afghanistan, "Hamdi's claims have no practical consequences for the conduct of the military overseas." J.A. 64-65. [FN4] I do not see how the petitioner could be any clearer. He acknowledged that "[a]ccording to *both* the Petition *and* the Mobbs Declaration, Petitioner Hamdi was captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001," J.A. 67 (emphasis added), represented that "[i]n January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba," J.A. 69, and complained that Hamdi was being punished by his "isolat[ion] from others similarly situated in Afghanistan and Guantanamo Bay, Cuba." J.A. 71. [FN5]

FN4. We have also been challenged for our alleged "altered and paraphrased rendition" of the petition's allegation concerning the location of Hamdi's seizure. We did interpret the petition as alleging that " 'Hamdi was captured or transferred into the custody of the United States in the Fall of 2001' *in Afghanistan*." *Hamdi*, 316 F.3d at 460 (emphasis added); *see* J.A. 10. But, even if we assume that the petition was ambiguous on this point, we did not "suppl[y] a geographical location of [Hamdi's] seizure and detention" nor "imput[e] a representation as to this location to the next friend," as charged by Judge Luttig; the next friend supplied the geographical location. Any ambiguity as to whether Hamdi was captured or transferred to the United States military in Afghanistan was likewise cleared up by the next friend's own characterization of his claim.

FN5. Consistent arguments were also made to this court. For example, Hamdi argued that no deference was due the Respondents because, *inter alia*, "Hamdi's claims do not challenge the conduct of foreign policy, military decision-making, or even the propriety of his initial detention in Afghanistan," but instead challenge "the legality of his indefinite detention in a Norfolk naval brig without due process." Appellees' Brief at 27. Later, it was again represented that "Hamdi's claims do not require review of Respondents' prosecution of the war effort. As noted earlier, Hamdi's claims do not seek judicial review of the Executive Branch's conduct overseas." Appellees' Brief at 40. At yet another point, Hamdi argued that the "Respondents [had] mischaracteriz[ed] Hamdi's claims as an effort to 'second-guess[ ] the military determination' of his enemy combatant status," representing that "[o]n the contrary, the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas...." Appellees' Brief at 44. And, during oral argument, Hamdi again clarified that he was *not* challenging the legality of his initial seizure and detention *in Afghanistan* as an enemy combatant, but rather was only asserting that as one moves away from a foreign battlefield to the United States where civil courts are open and functioning, the deference due to the military's battlefield decision decreases.

Additionally, as Judge Motz has observed in her dissent, we had been presented in the Joint Appendix with a letter written by Hamdi's father to United States Senator Patrick Leahy (which *petitioner* had submitted to the district court). In the letter, Hamdi's father stated that Yaser had "left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," "was trapped in Afghanistan once the military campaign began," and "was caught up ***348** in a local dragnet of non-Afghans in Mazar- e-Sharif in Afghanistan in November 2001" along with John Walker Lindh. J.A. 153. He was then "kept in [an] Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he [was] an American citizen, then they moved him to the Norfolk jail." J.A. 154. At no time was it ever hypothesized that Hamdi might not have been in Afghanistan when

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he was seized. Indeed, it was affirmatively represented that Hamdi was "caught at the same time Mr. John Walker Lindh was caught" in Afghanistan, but that he was "not [being] treated the same way," and was not properly determined to be "an enemy combatant." J.A. 154. [FN6]

FN6. *See* *United States v. Lindh*, 227 F.Supp.2d 565 (E.D.Va.2002); *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va.2002); *United States v. Lindh*, 198 F.Supp.2d 739 (E.D.Va.2002).

In keeping with affirmative representations made to the court, at no time did anyone on either side of this controversy aver or allege that Hamdi was anywhere other than Afghanistan when he was captured or detained by the Northern Alliance or when he was turned over to the United States military. Judge Luttig has not pointed to a single contrary allegation. Nor did Hamdi's most capable counsel "gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat," as Judge Luttig might have us believe. The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was captured there by our military, but that he was not there as an enemy combatant. Even in his petition for rehearing and rehearing en banc, Esam Hamdi did not assert that Yaser was somewhere other than in Afghanistan when seized; on the contrary, the petition *affirmatively acknowledges* that Hamdi's presence in Afghanistan is indeed an "undisputed" fact. The petition seeks a remand in order to allow Yaser Hamdi the opportunity to meet with counsel and contradict the government's assertion that he *was in a zone of combat operations* within the country of Afghanistan. Again, the petition seeks to litigate the factual question of *why* Hamdi was in Afghanistan when he was seized and, more precisely, whether he was actively engaged as an enemy to our forces, not *whether* he was in Afghanistan during wartime.

I cannot base a decision in so momentous a case on the theoretical possibility that the general allegations in the petition--that the United States obtained access to Hamdi and other prisoners in the custody of the Northern Alliance in Afghanistan and transferred these prisoners "captured in Afghanistan" to Guantanamo Bay--are wrong and do not apply to Hamdi's situation. Indeed, it would be ludicrous for us to somehow presume that they were not intended to be believed. Nor do I know of any precedent that would prompt us here to ignore the factual representations made by the petitioner and counsel in support of the petition. Because the government moved to dismiss the petition, I have assumed the factual allegations of the petition to be true and, for that matter, have accepted the petitioner's in-court representations regarding how they were intended to be interpreted. I am unfamiliar with any principle that would require us to assume that the factual allegations and in- court representations made by the petitioner *and* the government are false, and none has been cited to me. Indeed, it would seem inappropriate for us to impute such strange intentions to Hamdi's father and his counsel. *Cf.* ***349***S. Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 428 n. 8 (3d Cir.1999) (employing a "reasonable reading of the complaint" to supply an allegation not expressly made by the plaintiffs).

Petitioner's position has remained quite constant throughout this appeal-- that, because Hamdi is an American citizen by birth, he was entitled to meet with appointed counsel in order to contest the factual basis underlying the military's designation of him as an enemy combatant, as opposed to a peaceful resident, in Afghanistan--*once he was removed from the battlefield.* We found this position untenable, holding (for a great many reasons which I need not reiterate here) that when an American citizen is captured in an enemy country where we are engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case. I am still of the belief that this is the proper and legal course of analysis. And I reject, with little hesitation, this bemusing attempt to rewrite the case history and the substance of the habeas claim placed before us.

B.

I likewise disagree with Judge Luttig's belief, shared by Judge Motz, that Hamdi's capture in Afghanistan is not "susceptible to concession in law because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." I am also cited to no authority for the proposition that we should ignore or disbelieve the petitioner's allegations that Hamdi was taken into military custody in Afghanistan during the combat operations being waged there at the time (whether made expressly in the petition, by implication from its allegations, or by virtue of the petitioner's representations as to the intended meaning of the allegations) merely because the allegations were not personally written by Yaser Hamdi.

Indeed, a next friend does have the power to admit facts on behalf of the real party in interest, subject to the supervision of the court. *See* Hall v. Hague, 34 F.R.D. 449, 450 (D.Md.1964). Were it otherwise, a next friend might be compelled to contest every fact which might be relevant, thereby creating unnecessary trouble and expense for the parties and the court. *See id.* at 449-50. Or, the mere filing of a next friend petition challenging civil disabilities might compel the lifting of such disabilities so that the real party in interest might participate fully in the litigation. The latter possibility is particularly ominous in a case such as this, as it would enable an alleged enemy combatant to disrupt, with no showing whatsoever, safeguards that the Executive has determined are necessary to protect vital national security interests. [FN7] In sum, I do not believe the panel erred in construing the petition to admit that Hamdi was captured in Afghanistan and in giving effect to that admission.

FN7. The cases cited by Judge Motz do not compel a contrary conclusion. *See* White v. Miller, 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921 (1895); Kingsbury v. Buckner, 134 U.S. 650, 680, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); Stolte v. Larkin, 110 F.2d 226, 233 (8th Cir.1940). The cases do not translate to a holding that the court, as opposed to the next friend, is charged with the duty to rewrite a claim brought by a next friend on behalf of a military detainee so as to assure its survival. Here, there is no reason to believe that rights are being bargained away or that a factual mistake is being made. There is surely no doubt as to the nature of the claim before us.

C.

This brings me, regrettably, to Judge Luttig's accusation that Judge Wilkinson *350 and I have "attempt[ed] to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone." In a series of charges, Judge Luttig complains that Judge Wilkinson's concurrence "makes reference not only to the next friend petition upon which the panel solely relied, ... but also to the new materials cited by the government in its response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded, [including] Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court ....", charges that this is but another example of "the trend in our court to attempt 'to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion,' " and presumes that our reliance upon petitioner's representations made about his petition is but an improper attempt to "shore up" our joint panel opinion because the panel now "senses ... analytical softness of its opinion."

First, I can state without hesitation that I have no "sense" that our decision is analytically soft at all. On the contrary, the dissent's failure to point to a single allegation or statement in the record of this case that creates a dispute as to where Hamdi was when he was seized or detained by our allies or our own military forces should end the discussion.

Second, Judge Luttig appears to have forgotten his characterization of our panel opinion as a "challenged panel opinion," albeit *challenged* in the form of the dissents written by Judge Luttig and Judge Motz to the full court's vote *not* to rehear the case en banc. Judge Luttig's criticism appears to be premised upon a belief that when panel members write in response to a dissent to a denial of rehearing en banc, it is improper for them to refer to anything in the original record which was not specifically referenced in the panel decision, as this would amount to "supply[ing] ... important new facts or reasoning" not susceptible to appellate review. Such "additional support," Judge Luttig asserts, became "irrelevan[t] as a matter of law given that they were not relied upon in the panel opinion."

Obviously, any response by a panel, unanimous at the time the decision was rendered, to a dissent from a denial of rehearing en banc might be construed as an act of bolstering or "shor[ing] up" the published opinion in some sense. Otherwise, there would be nothing to say. Yet, I find no reason to remain silent when our opinion is being misinterpreted. I am confident that neither Judge Wilkinson nor I have informally "modif[ied]" the panel decision which we, along with Judge Wilkins, so painstakingly authored together. It is not my opinion-writing practice to recite every source of information contained within a joint appendix, nor every source directly relied upon in arguments. Indeed, there is rarely, if ever, a need to clutter an opinion with record support for uncontroversial statements that the parties have not contested in their pleadings, responses, briefs, or arguments.

In any event, I see no need to modify the panel opinion because we have pointed to no "important new facts or reasoning." We observed in the panel opinion that the habeas petition before us for disposition placed Hamdi in an enemy country when he was seized and detained by our military forces as an enemy combatant. In response to Judge Luttig's charge that the language of the petition does *not* place Hamdi in Afghanistan at the point of seizure, Judge Wilkinson and I have only gone so far as to point out that any question*351 as to whether we have properly characterized the claims can be laid to rest by petitioner's own characterization of those allegations. Neither of us has pointed to anything that has not at all times been a part of the record and entirely consistent with the petition's allegations outlined above. [FN8]

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FN8. For this reason, I also think it misleading to characterize the Traverse and Leahy letter as "new materials cited by the government in response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded." These materials have been in the district court record and in the Joint Appendix since the inception of the appeal, and have been referred to by the parties throughout this litigation. There is nothing "new" about them. With specific regard to Esam Hamdi's letter to Senator Leahy, we are additionally confronted by Judge Motz's view that it was improperly "ignored" by us and Judge Luttig's belief that it should have been ignored because it is "obviously irrelevant" to the issue. We considered everything submitted by the parties in the Joint Appendix and all of the arguments when authoring our joint opinion. We did not ignore the Leahy letter or find it to be "obviously irrelevant." The letter was presented to the district court by Hamdi's counsel, along with several other documents. The panel did not expressly cite to the letter to support the observation that Yaser Esam Hamdi was captured in a combat zone. But, like the Traverse (and other representations made below and at oral argument before this court), the Leahy letter was perfectly consistent with the unremarkable observation which we drew from the allegations of the petition before us and as they had been represented to us, *i.e.*, that Hamdi was indeed in Afghanistan when he was seized. It certainly did not raise any ambiguity in the petition concerning Hamdi's location when he was seized.

II.

I turn next to Judge Luttig and Judge Motz's shared belief that we have placed undue significance on the fact that Hamdi was seized in a foreign combat zone in evaluating the legal sufficiency of the Mobbs Declaration and, by doing so, have somehow paved the way for widespread deprivation of the individual constitutional rights of our citizens.

First, we have not pulled the significance of this simple fact from thin air. It is grounded in the time-honored rule of law in wartime--that all persons residing in an enemy country during hostilities are deemed to be enemies, regardless of nationality. *See Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06, 29 S.Ct. 385, 53 L.Ed. 520 (1909). "[U]nder the recognized rules governing the conduct of a war between two nations, ... all persons, whatever their nationality, who reside [ ] [in the enemy country] [are], pending such war, to be deemed enemies of the United States and all of its people." *Id.*; *see also Lamar v. Browne*, 92 U.S. 187, 194, 23 L.Ed. 650 (1875); *Young v. United States*, 97 U.S. 39, 60, 24 L.Ed. 992 (1877). This is not to say that all persons residing within the enemy country are *in fact* enemies, or specifically that Hamdi was necessarily an enemy combatant merely because he was in Afghanistan during a conflict between the United States and the Afghan government. But, significant consequences necessarily attached to Hamdi's presence in Afghanistan; his individual rights stood in tension with the Executive's wartime powers under Article II. Consequently, the Judiciary became compelled, by the nature of war and by dint of the separation of powers we are required to safeguard and honor, to give deference to the Executive to determine who within a hostile country is friend and who is foe. [FN9]

FN9. In his petition for rehearing and rehearing en banc, petitioner argued it could only be said to be undisputed that Hamdi was in a zone of active combat operations if the entire country of Afghanistan is such a zone at the time of capture. I have no problem with this view. The United States is in a sanctioned military operation designed to oust from power the governing regime of the country of Afghanistan. Just as we "are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not," *Hamdi*, 316 F.3d at 474, we are ill-positioned to question the military's determination that any particular area of a country with whom we are at war is or is not an "active combat zone."

*352 Second, Judge Motz and Judge Luttig's collective fear that our recognition of this time-honored principle might result in innocent journalists or unwitting tourists falling victim to unreviewable military detentions anywhere in the world can be easily laid to rest. Judge Motz, for example, asserts that our decision would allow "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [to] be imprisoned indefinitely" by our military, that "any American citizen seized in a part of the world where American troops are present--*e.g.*, the former Yugoslavia, the Philippines, or Korea--could be imprisoned indefinitely, merely by asserting that the area is a zone of active combat," and the even more

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extreme "fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, *even one captured on American soil*, who the Executive designates an 'enemy combatant,' as long as the Executive asserts that the area in which the citizen was detained was an 'active combat zone,' and the detainee, deprived of access to courts and counsel, cannot dispute this fact." Judge Luttig also points to "[t]he embedded journalist or even the unwitting tourist" who "could be seized and detained in a foreign combat zone." And, he too claims that such a likelihood would be "far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state."

Although effective in stirring emotion, our colleagues' expressed fears are grounded in conclusions not reached or even predicted by the panel decision. Our decision does not speak to the issue of whether an "enemy combatant" may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations for purposes of the President's exercise of his Article II war powers. Rather, it addresses only the appropriate level of deference to be observed when the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime. Nor does it sanction indefinite detention, but rather contemplates detention for the duration of such hostilities.

In short, my colleagues' collective desire (albeit undertaken for much different reasons) to redefine the case before us has caused them to lose their focus on our holding. Afghanistan is an identifiable nation state and Hamdi was in a conventional war situation. Every resident within Afghanistan (including Hamdi as was explicitly alleged) was in law an enemy, until determined by the Executive to be a friend. As Judge Wilkinson aptly observed, war is a messy business and mistakes can be made. American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one. But the circumstances of armed conflict against a foreign government in a foreign land require the deference we have shown the Executive in the making of military decisions.

*353 III.

Despite their common criticism of our observation that Hamdi was captured in Afghanistan--and our belief that Hamdi's capture in Afghanistan guides our inquiry as to whether the Mobbs Declaration is sufficient to justify Hamdi's detention as an enemy combatant--our colleagues differ significantly in their opinions as to what kind of review is appropriate.

Judge Motz would hold that the Mobbs Declaration is *insufficient* to justify Hamdi's enemy combatant designation. And, although she disagrees that Hamdi's capture in Afghanistan is undisputed, in the end it really matters not to Judge Motz whether Hamdi was seized in Afghanistan. As Judge Wilkinson has noted, Judge Motz believes it proper for the Judiciary to litigate precisely why Yaser Hamdi was seized and whether the military capture can be justified regardless of where the seizure occurred. In short, Judge Motz "would require a greater showing from the Executive before [she] would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer." For the reasons expressed by Judge Wilkinson, I, of course, disagree.

Judge Luttig also contests our observation that Hamdi was present in Afghanistan when he was captured, but only pays lip service to Judge Motz's belief that we would have to give Hamdi access to counsel and a direct voice in an Article III court in order to determine his place of seizure. Unlike Judge Motz, it appears that Judge Luttig would in practice not give Hamdi a voice to either concede or dispute the place of seizure. Rather, Judge Luttig "believe [s]" he would adopt at most a "some evidence" standard as the appropriate level of deference due and "would likely conclude, as argued by the United States, that the facts recited in [the Mobbs' Declaration] are sufficient" to satisfy it. In other words, it seems Judge Luttig would hold that the Mobbs Declaration is *sufficient* to justify Hamdi's enemy combatant designation *regardless* of whether Hamdi admitted his presence in Afghanistan or flatly disputed it.

From this, I can only assume that Judge Luttig is really dissatisfied not because we have refused to give Hamdi a voice to raise a dispute as to his place of seizure, but because we evaluated the legal sufficiency of the government's response within the context of Hamdi's capture in Afghanistan. Thus, Judge Luttig charges, by "refus[ing] to rest decision on the proffer made by the President of the United States" and instead "rest[ing] decision on a putative concession by the detainee," we have "all but eviscerate[d] the President's Article II power to determine who are and who are not enemies of the United States during times of war." He accuses us of "disown[ing] [our] promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States," and

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predicts that our rule "will henceforth ... cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee." "[I]n every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," Judge Luttig laments, "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Such hyperbole is not only unwarranted, it is plainly wrong.

Judge Luttig's first misrepresentation lies in his characterization of our opinion as holding that "more is 'unnecessary to a *354 meaningful judicial review' of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone." We have held no such thing, nor can such be fairly read from our opinion. The inaccuracy of this "paraphrased rendition" of our holding is readily apparent. The language quoted by Judge Luttig from the panel opinion is excised from the following passage from our opinion which follows an extensive discussion of the contents of the Mobbs Declaration and the practical problems of active judicial supervision of combat operations overseas:

> [B]ecause Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and ... is consistent with the Constitution and laws of Congress. *Asking the executive to provide more detailed factual assertions* would be to wade further into the conduct of war than we consider appropriate and *is unnecessary to a meaningful judicial review* of this question.

Id. 316 F.3d at 473 (emphasis added) (citations omitted). Obviously, we did not hold that Hamdi's concession of seizure in a foreign combat zone rendered further judicial inquiry into an enemy combatant designation unnecessary. For the constitutional and practical reasons extensively discussed in the opinion, we held that Hamdi's presence in a war zone when seized rendered judicial inquiry *beyond* the legal sufficiency of the government's response unnecessary to a meaningful judicial review.

Indeed, we expressed *no* opinion as to whether the Mobbs Declaration was more than sufficient or just enough to ensure meaningful judicial review of the Executive's detention of an American citizen in an enemy country as an enemy combatant. The submission of the Mobbs Declaration was not directed by the Judiciary. Rather, the government voluntarily opted to provide, under oath, a level of information it believed to be legally sufficient to justify detention of an American citizen captured during the course of armed conflict in a foreign theater of battle, and asked us to respect the balance of powers and accept it as sufficient to warrant dismissal of the petition before us. And, we did indeed accept the Executive's voluntary proffer as sufficient. We took care not to make grand pronouncements as to what we might do in a different case, and even went so far as to expressly discourage any propensity on the part of others to view our decision as moving beyond the set of circumstances before us. Judge Luttig decries what he believes to be a "Pyrrhic victory" for the government, but it has lost nothing. Even if we assume that the government sought such a broad holding, the most that can be said is that they did not get all they wanted and must seek it elsewhere.

Judge Luttig's second misrepresentation comes in the form of the prediction that, as a result of our opinion, "in every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Our opinion says no such thing. We held that the Mobbs Declaration was sufficient to allow meaningful judicial review of Hamdi's detention because he was within a hostile country when captured. We did not predict what would constitute meaningful judicial *355 review of the detention of an United States citizen in cases in which the place of seizure is unknown or alleged to be within a country with whom we are not actively at war. Although we left open the possibility that the place of seizure might require further factual inquiry depending upon what representations the government provided, we did not hold that extended judicial review of the Executive's determination *that one is an enemy combatant* would become appropriate merely because a dispute existed *as to the place of capture*. Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case. Our opinion dealt, as it should, with the precise situation before us.

IV.

Finally, while I fully recognize that we have not gone as far as Judge Luttig would have us go, I take umbrage at his charge that this panel, as a result of "decisional paralysis," has "retreated" from its constitutional duty to decide this case based upon the facts presented and, instead, has fabricated a fact to ease our task. Nothing could be further from the truth. The government makes no such charge, no doubt cognizant that, in accordance with time-honored principles of constitutional decision-making, we have gone no further than necessary to resolve the delicate balance of

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constitutional interests before us. *See Poe v. Ullman*, 367 U.S. 497, 503, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of strictest necessity.") (quoting *Parker v. County of Los Angeles*, 338 U.S. 327, 333, 70 S.Ct. 161, 94 L.Ed. 144 (1949)); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' ") (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)); *id.* ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' "). *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Nor, for that matter, does the petitioner, who argues not that Yaser's presence in Afghanistan was a matter of dispute, but only that we should not as a legal matter rely upon the allegations of the petition and the representations of the petitioner for the premise that Yaser was in an active combat zone within that country.

Nor is it fair to say that we "retreated to ground that ... neither party attempted to defend." The government has recognized the significance of the place of capture from the outset of this case, arguing to us that "[t]he military determination at issue in this case--the decision to detain someone who was armed with an assault rifle when he surrendered *in a combat zone* as part of an enemy unit--directly implicates the national defense, not to mention the safety of American soldiers still stationed *in the zone of conflict*, and falls at the heart of the military's ability to conduct war." Respondents' Brief at 27. So has the petitioner, who has repeatedly disclaimed any intent to challenge a battlefield seizure in Afghanistan, but only Hamdi's current detention in the United States.

This case was presented to us on appeal from the district court's order finding that the Mobbs Declaration was insufficient to *356 allow meaningful judicial review of Hamdi's classification as an enemy combatant. We held that the Mobbs Declaration provided by the government in response to the habeas petition was sufficient to uphold Hamdi's detention as an enemy combatant under the President's wartime powers. We have upheld the President's Article II power as Commander in Chief of the armed forces to defend this country from its enemies and to determine who are and who are not enemies of the United States within countries where we are engaged in active hostilities.

Yaser Hamdi's status as an American citizen entitles him to petition the Judiciary personally, or by next friend if he cannot for reasons of national security, for habeas relief and thereby to demand a response from the Executive as to why the detention is an acceptable utilization of his Article II powers. In the exercise of our Article III powers, we review that response and may consider any legal arguments as to why the detention does not comport with a lawful exercise of war powers. Because Hamdi was within a country with whom we were fighting when he was seized, principles of separation of powers and practicalities of armed conflict dictate that we defer to the Executive's determination as to who is foe and who is not. Hamdi may test the legal basis for his detention. But, beyond that, Hamdi may be held, not indefinitely, but for the duration of active hostilities just like other non-citizen detainees captured in an enemy country by our military forces making a battlefield determination that the person detained was there to take up arms against our soldiers. And, in the holding most overlooked but most directly applicable to the claim as it was filed and argued before us, Hamdi's transfer by the military from the enemy country to Guantanamo Bay and then to the United States did not result in a greater right to challenge his designation.

In the end, Judge Luttig complains not because we accepted the Mobbs Declaration as sufficient and, thereby, granted the President the deference he sought from us. Rather, he complains because we have not forecast a similar level of deference in other contexts by adopting a global standard of review for all Executive detentions undertaken in the "war against terror." But, in order to reach this broader holding, he must attempt to find fault with our observation that Hamdi was in Afghanistan when seized, and he must characterize, however inaccurately, our opinion as resting *solely* upon that observation.

The impropriety of reaching beyond this case to decide another is, in my view, quite obvious. Judge Luttig opines that he would probably adopt the "some evidence" standard advanced by the government and hold that the Mobbs Declaration would be sufficient even in the face of a factual dispute as to whether Hamdi was in Afghanistan. That question, however, does not merely raise a single difficult issue, as posited by Judge Luttig, as to what the global standard should be for this and other cases. Rather, it raises many difficult issues related to the President's Article II wartime powers and how they will ultimately be interpreted in an age of terror. And, no matter how interesting such questions may be, they are simply not before us. We are not dealing with the President's designation of Hamdi as an enemy combatant because he is a terrorist in the "war against terror" declared after the tragic events of September 11, 2001. Had Hamdi's

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petition been grounded in an allegation that he was seized in France under the auspices of the "war against terror," and had the military agreed to that allegation and designated him an enemy combatant, then we would have a much *357 different case. Had Hamdi's petition been grounded in an allegation that he was seized in the United States under the auspices of the "war against terror," and the government agreed, then we would have a case not unlike Padilla v. Rumsfeld. [FN10] In both hypothetical situations, we might well be called upon to weigh other important national security interests. Whereas we would not likely face the dilemma of pulling military commanders out of the theater of war to testify in a court of law, for example, we would likely encounter such issues as whether France or the United States is a "zone of active military operations" and, if not, whether such seizures in a noncombat country can be a valid exercise of the Executive's Article II war power.

FN10. *See* Padilla v. Rumsfeld, 243 F.Supp.2d 42 (S.D.N.Y.2003); Padilla v. Bush, 233 F.Supp.2d 564 (S.D.N.Y.2002).

I need express no opinion on such issues because they are not before us. As the government's response to the petition makes clear, we are dealing with the President's designation of Hamdi as an enemy combatant in the war against Afghanistan with the stated goal of ousting the Taliban regime in order to end its support for Al Qaida and other terrorist networks. The conflict in Afghanistan is certainly related to the global conflict referred to as the "war against terror," but it is unquestionably a military conflict that falls quite neatly within our historical concepts of war. The questions Judge Luttig wishes to address might include some of the more novel, complex, and interesting ones a court could be called upon to contemplate, but no matter how much we might like to deal with them, they are not before us. We should not reach beyond this case to decide them.

LUTTIG, Circuit Judge, dissenting from denial of rehearing *en banc*:

As should be true under a rule of law, the reasoning underlying our resolution of the important issue presented by this appeal has implications beyond the particular dispute before us. In this instance, those implications are for no less commanding constitutional interests than the President's power to conduct war and the right of our citizens to be free from governmental restraint except upon lawful justification.

As my colleagues have recognized, the panel's opinion resolving the important issue presented by this suit is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as "undisputed," when those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances. That the panel opinion is unpersuasive is borne out by no less significant a fact than that the panel itself, as evidenced by the two separate concurrences today, cannot even now agree as to either the proper interpretation or defense of its opinion.

Additionally, beyond the opinion's unpersuasiveness, its refusal to rest decision on the proffer made by the President of the United States, and its insistence instead upon resting decision on a putative concession by the detainee, has yielded reasoning that all but eviscerates the President's Article II power to determine who are and who are not enemies of the United States during times of war.

Because of the facial unpersuasiveness of the court's opinion, and because the opinion of law that resolves the issue raised in this appeal is of even greater *358 constitutional importance than the result reached by that opinion, I would grant the requested rehearing *en banc*. I believe that the significance of the issue that has been presented calls for an opinion from this court that directly addresses that issue and resolves it unambiguously and convincingly (however broadly or narrowly), based upon the facts as they appear in the record and the arguments as they have been well made by the parties.

I.

On the central question presented in this case, it is evident that the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant, under any standard of review urged by those who appeared on behalf of Hamdi. However, the panel was equally unwilling either to adopt the "some evidence" standard and accept as sufficient under that standard the facts offered by the government as justification for Hamdi's seizure or to hold that the Judiciary is without all authority to review the President's designation of an individual as an enemy combatant, as alternatively urged by the government. Faced with this decisional paralysis, the panel retreated to ground that not only neither party attempted to defend, but that is transparently indefensible--holding that Hamdi cannot challenge, and the court cannot question, the facts proffered by the government in support of Hamdi's particular seizure and detention as an enemy combatant, for the asserted reason that

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Hamdi has *conceded* that he was seized in a foreign combat zone.

A.

In resting its decision on this factually and legally untenable ground, the panel reneged on the promises it hastily made to the parties at the litigation's inception.

It promised the citizen seized by the government "meaningful judicial review" of his claim that he was not an enemy combatant, pointedly refusing to "embrac[e] a sweeping proposition--namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir.2002) ("*Hamdi II*"). But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant.

One could hardly be faulted for wondering why, as the panel held, more is "unnecessary to a meaningful judicial review" of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone. Under even an exceedingly deferential standard of review, such, though it is relevant to, would hardly seem dispositive of whether one has been legitimately classified as an enemy combatant. The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state. But surely we would not conclude that that journalist or tourist (who could be expected to readily admit to his seizure in the foreign combat zone) had received meaningful judicial review of his claim that he was not an enemy combatant, if that claim received no judicial scrutiny at all merely because he stipulated that he was seized in that foreign combat zone. It is undoubtedly *359 for these reasons that the Executive neither designated Hamdi an enemy combatant on the basis of his mere seizure in a foreign combat zone nor defends its designation in this court on such basis.

But as the panel disowned its promise to the detainee to provide him meaningful judicial review, so also did it disown its promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States. The panel promised the Executive that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant of the United States, but it adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee.

Upon a moment's reflection, it is apparent that the rule of law that was fashioned by the panel professedly in the name of deference to the Executive, and that now binds us, is, in application, a rule of no deference at all. For counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant in every instance in which the petitioner but refrains from affirmative concession that he was seized in a foreign combat zone. The Executive's undeniably important interests in the prohibition of access to detained enemy combatants for reasons of national security and in the conduct of war free from fear that it will be summoned to court to answer to the Judiciary for its enemy designations, thus, are uncomfortably protected by little more than the hope (vain after the court's opinion, if not before) that the habeas petitioner will gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat.

That the government's victory is but thinly guised defeat could not be better confirmed than by the arguments that have already been made in opposition to, and in support of, the panel's opinion by the parties to this dispute. Thus, those appearing on behalf of Hamdi argue, to no surprise and in compelling understatement, that the panel fundamentally erred for the reason that, "it cannot fairly be stated that it is 'undisputed' that Hamdi was captured within a zone of active combat operations in a foreign country" "[b]ecause Hamdi was denied the opportunity to meet with counsel, and was refused the opportunity to dispute the facts put forth by [the government]--including assertions as to where he was captured and what the circumstances were at the time." Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc, at 12-13. The obvious remedy for this error being, they reasonably claim, a remand for further factual development on the issue, with allowance for participation by Hamdi himself.

And the government, as expected, rejoins that "the type of evidentiary proceeding that appellees seek would raise precisely the same problems concerning judicial oversight of military operations overseas that the panel properly concluded is not only unwise, but unauthorized under our constitutional scheme." Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing en Banc, at 11.

A more Pyrrhic victory would be hard to conceive.

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In sum, then, because of its unwillingness to confront head-on the admittedly difficult issue presented by this appeal, decide upon the standard of review required by the Constitution, and resolve the case by application of that standard to the facts proffered in justification for the Executive's ***360** designation of Hamdi as an enemy combatant of the United States, the panel succeeded in securing *neither* the guarantees of the Bill of Rights nor the powers committed to the Executive by Article II of the Constitution.

B.

These breaches perhaps could be excused if the panel had divined an unassailable narrower ground for decision than that foreshadowed by either of its bold promises. However, its decision cannot be excused on this basis, because the ground upon which the panel rested its decision is anything but unassailable. *For it simply is not "undisputed" that Hamdi was seized in a foreign combat zone.*

For its repeated assertions that this circumstance is conceded, *see* Hamdi v. Rumsfeld, 316 F.3d 450, 459, 461, 465, 473, 475, 476 (4th Cir.2003) ("*Hamdi III*"), the panel relied solely on the petition filed by Hamdi's father as next friend. *See* id. at 460; id. at 461 (stating that the Mobbs affidavit "confirms the material factual allegations in Hamdi's petition"); id. at 474 ("Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution...."). As the panel wrote,

> [i]n this case, there are two allegations that are crucial to our analysis. *First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan....* Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detentions, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Id. at 471 (emphasis added). Thus, the panel opinion quite clearly rests on the petition alone for the court's conclusion that seizure in a combat zone was "undisputed."

But the next friend petition says no such thing as the panel held that it does. It states that, "[w]hen seized by the United States Government, Mr. Hamdi *resided* in Afghanistan." J.A. 9 (emphasis added). Of course, it is a *non sequitur* to conclude from the representation that Hamdi *resided* in Afghanistan at the time of his seizure, that he was also *seized* in a foreign zone of active combat. In the end, it is obvious that the panel simply missed the critical import of this distinction between residency on one hand, and seizure or capture on the other, even though it recognized--at least in passing--the distinction between the two. As it said, though incorrectly as to the latter, "Hamdi's petition alleges that he was a resident of *and* seized in Afghanistan...." *Hamdi III*, 316 F.3d at 471 (emphasis added).

Insistence that the distinction be drawn between acknowledgment of residency and concession of seizure in a combat zone is not to be clever. I have no reason to believe that Hamdi was not in a combat zone at the time of his seizure, and, to the extent relevant, I believe that he was. But, as a court of law, we cannot impute a concession of this circumstance of seizure from an innocuous acknowledgment of residency in a country in which combat was underway. Such is not credible.

No more so can other statements that appear in the next friend petition and relied upon by the panel be fairly taken as concession that Hamdi was actually seized in a foreign combat zone, as opposed to acknowledgment merely that he was a resident of a country in which there was ongoing combat at the time of seizure. The panel recites that,

> ***361** [a]ccording to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance."

Hamdi III, 316 F.3d at 460. The panel apparently viewed the quoted petition passages similarly as conceding seizure in a foreign combat zone. But a careful reading of these passages reveals that neither is such a concession fairly inferable from them. Most obviously, neither passage says anything at all about *Hamdi*. But, additionally, even if they had, there is no reason to presume that every person who was held by the Northern Alliance (assuming, for the moment, that Hamdi falls within that class) was captured in Afghanistan during the course of combat operations. Of course, this may have been the case. But it also may not have been.

The final statement in the next friend petition that the panel quoted, and on which it seemingly relied, was at once materially abbreviated by the panel and materially supplemented. The materiality of both the omission and the addition is apparent when the actual quotation from the petition is read side-by-side with the panel's altered and paraphrased rendition of that quotation. The petition actually reads as follows:

> On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. In its opinion, however, the panel relates the statement in this way:

> The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" *in Afghanistan*. ...

Hamdi III, 316 F.3d at 460 (emphasis added). Thus, terribly significantly given that the panel's opinion rests on the "undisputed" nature of the circumstance, the panel supplies a geographical location of seizure and detention that the statement in the petition just does not contain, imputing a representation as to this location to the next friend. And though it should not be necessary to put a finer point on it than this, even had the petition statement actually contained the geographical location of seizure and detention that the panel thought, the statement would not support the conclusion that the situs of seizure was conceded. For, even with this significant alteration, the statement would only admit that Hamdi was *either* "captured *or* transferred into custody," not necessarily one as opposed to the other.

In fact, upon reading the petition, it is actually apparent that it scrupulously avoids any admission as to the precise geographical point of seizure, likely because such was unknown to Hamdi's father, who filed the petition. *See* J.A. 11 (Petition: "On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X- Ray at the United States Naval Base in Guantanamo Bay, Cuba.... On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X- Ray, Guantanamo Bay, where he was held until April 2002.").

Because the panel opinion relies *exclusively* upon the next friend petition for its conclusion that Hamdi was conceded to have been seized in a foreign combat zone, and because none of the statements in that petition either concede or can be fairly read to concede seizure in such a location, ***362** the panel's opinion, which in turn rests exclusively upon such a concession, is unconvincing.

C.

Sensing the vulnerability of the panel's opinion, the concurrences in the denial of rehearing *en banc* (Judges Wilkinson and Traxler) attempt to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone. Thus, for example, Judge Wilkinson maintains, "Hamdi's own *filings* make clear that he was seized in a zone of active combat operations," *ante* at 342 (emphasis added), by which he makes reference not only to the next friend petition upon which the panel solely relied, *see, e.g.*, *Hamdi III*, 316 F.3d at 460; id. at 461 (stating that the Mobbs Declaration "confirms the material factual allegations in Hamdi's petition"); id. at 471 ("Hamdi's petition alleges that he was a resident of and seized in Afghanistan ...."); id. at 474 ("Hamdi's petition places him squarely within the zone of active combat ...."), but also to the new materials cited by the government in its response to the petition for rehearing, in support of the court's conclusion that the location of seizure has been conceded. In particular, excepting a letter that is admittedly "outside the legal arena" and thus obviously irrelevant, Judge Wilkinson cites to Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court and a statement by the district court. *Ante* at 342.

I have previously expressed my concern about the trend in our court to attempt "to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion, or even to fine-tune, if not fundamentally reshape, the legal analysis undertaken by the original panel, *in the course of opinions respecting the denial of rehearing en banc*." Jones v. Buchanan, 325 F.3d 520, 538-40 (4th Cir.2003) (Luttig, J., dissenting) (citing cases). Without repeating in full the reasons for this concern here, such attempted modifications are unfair to the litigants, because the parties (and the public) are bound by the panel opinion as it was written and issued, and they may obtain further review only of the issued panel opinion, without regard to modifications suggested by a concurrence in denial of *en banc* rehearing. In other words, they are bound by the only opinion of law in the case, not by the hypothetical opinion represented by the combination of the original panel opinion and purported modifications made during proceedings appealing for *en banc* reconsideration. This is not to say that explanatory concurrences in denials of rehearing *en banc* should never be written by the author of the challenged opinion or by judges who joined in that opinion; it is only to say that when such an opinion would add significant factual or legal support for the judgment reached, the appropriate course is for the panel to modify its opinion formally so as to supply the important new facts or reasoning in an opinion that then becomes the precedent for the court which may be appealed by the parties to the Supreme Court of the United States.

But putting this concern to one side, the very fact that the concurrences have felt need to offer up the additional support that they have is confirmation that the panel at least now senses the analytical softness of its opinion. There would otherwise be no reason to attempt to shore up that opinion with these additional materials, which the panel fully considered originally and rejected as not providing any ***363** support for its conclusion that the location of seizure was "undisputed."

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In any event, apart from their irrelevancy now as a matter of law given that they were not relied upon in the panel opinion, these additional materials, as the panel originally concluded, do not any more prove an affirmative concession that Hamdi was captured in a foreign combat zone, than do the statements contained in the petition filed by the next friend--even if, in combination with that sole filing relied upon by the panel, they render the case slightly closer.

Judge Wilkinson quotes from a traverse filed in the district court which reads that the petitioner's claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." J.A. 64. Much like the acknowledgment of Hamdi's place of residence, the observation that Hamdi's claim does not implicate his initial *detention* does not, and certainly should not in a court, say anything about where he was originally *seized*--at least not necessarily. As does the law, these parties themselves distinguish between seizure and detention throughout their submissions. If there were any doubt as to the inappropriateness of drawing such an irrebuttable inference as to place of seizure from place of detention in this instance, it should be put to rest by the fact that that very same traverse filing states that "[p]etitioner in no way concedes that Respondents' factual assertions are true." J.A. 65 n.1. Indeed, it even specifically states that "information about Petitioner Hamdi prior to his transfer to the custody of [the government] is based on the hearsay of unknown members of the Northern Alliance." *Id.* The other materials with which the concurrences now attempts to support the panel's opinion suffer from the same flaw, as they too speak only as to the place of detention, not the place of seizure.

Thus, neither the panel nor even the concurrences after the fact, adduce a single statement from Hamdi's petition or any other filing in this case in which there appears a concession that Hamdi was captured or seized in a foreign zone of active combat operations. A single example suffices to show the extent of the reach attempted by the panel. The concurrences now cite even to a defense counsel's single word of agreement with a statement made by the district court that Hamdi was "in a fighting situation." *Ante* at 342 n. 2 (citing Tr. of Aug. 13, 2002 district court proceedings). Not only is this single word of agreement with this statement made by the district court ambiguous on its face, it is followed by defense counsel's statement--omitted by the concurrences--that "what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured.... We don't know what happened." J.A. 394.

D.

But more important than the substantive content of any of these several oblique references marshaled by the concurrences in *en banc* denial is their source. These statements, however they are interpreted, are not from Hamdi or from counsel acting on his behalf. They are from Hamdi's father, acting as next friend, who, it has been represented to us, has not even had any contact with his son since the latter was seized over a year ago. As Judge Motz recognizes, even an unambiguous concession as to the location of Hamdi's seizure in such a third party submission cannot, as a legal matter, bind Hamdi to a fact that in turn is deemed dispositive of his claim for freedom.

In no sense, then, is the place of Hamdi's seizure "undisputed" by the parties to this suit. An opinion that rests exclusively ***364** on the premise of a stipulated agreement as to this circumstance of seizure, as does the panel's, is simply unconvincing. And it is rendered no more convincing, even if it is thought more palatable, by the fact that resting decision on this ground permits superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant, *see* Hamdi III, 316 F.3d at 465 (citing and distinguishing *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y.2002)), which case the panel feared might unavoidably be reached by a decision on the issue as presented and under the facts as proffered.

E.

Judge Traxler writes extensively in defense of the panel opinion, although, beyond embracing the materials newly cited by Judge Wilkinson, he does little more than repeat at length the panel's reasoning (where needed, embroidering upon that opinion for himself), and quote liberally from this and Judge Motz's opinion. But the juxtaposition of the particular defenses that he chooses to make, with their obvious responses, all but confirms to the careful reader the shortcomings in the panel's opinion. It is undoubtedly for this reason that Judge Traxler's co-panelists, who, with him, jointly authored the original opinion, do not align themselves with him today.

1.

To begin with the most significant, Judge Traxler, though writing to bolster the panel's conclusion that the place of seizure in a foreign combat zone was in fact conceded in the next friend petition, actually ends up admitting that the petition itself does *not* explicitly concede seizure in such a zone. *See, e.g., ante* at 345-346 ("Judge Luttig correctly observes that the habeas petition does not *explicitly* state that 'Hamdi was captured in a zone of active combat in a foreign theater of conflict.' "); *id.* at 345 (stating that "the petition[ ] fail[s] to affirmatively state that Hamdi was captured in

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a foreign combat zone"). This is an admission of no small consequence, of course, for the panel relied entirely upon the existence of such a concession of capture in a foreign combat zone in the petition, and the opinion plainly regarded this concession as having been made explicitly and unequivocally. Certainly, until today, the reader would have never thought otherwise. Nowhere, for instance, is there even the slightest suggestion that the panel regarded this dispositive concession as merely "implicit." And there certainly is no mention of any inferential steps of which one would expect explanation before a dispositive concession is implied by a court.

By this candid admission alone, Judge Traxler has made out the case against the panel's opinion better than have either Judge Motz or myself. For if, as Judge Traxler says, this is a "momentous" case, then he has now confirmed that it was dismissed on the basis of a concession believed by the panel (though disputed by the parties) to have been made only "implicitly," and at that, by a third party to the action who not only had had no contact whatsoever with the petitioner himself, but who even disavowed that he could speak to the facts except upon information and belief.

Unwittingly compounding further the analytical problems that beset the panel's opinion as it is written, Judge Traxler next attempts to marshal for the first time support for what was the panel's assumed, but wholly unsupported, holding that a next friend may concede facts sufficient to conclude a litigation when the detainee is inaccessible to the next friend by reason of the ***365** respondent's own actions. All that need be said as to this effort is that, after now critically addressing himself as a single judge to the proposition that the panel originally uncritically assumed, Judge Traxler is able to cite only a single case and that of a district court almost forty years ago. *See ante* at 349 (citing Hall v. Hague, 34 F.R.D. 449 (D.Md.1964)). *And not even that case holds that a next friend may concede the facts that will lead to the dismissal of the plaintiff's suit in circumstances anywhere approaching those presented by this case.* Thus, on this score as well, has Judge Traxler made the case for dissent better than have either Judge Motz or myself.

Judge Wilkinson, to his credit, recognizes as much, and attempts to salvage the panel opinion on this critical point by asserting that "ordinary civil [and] criminal litigants" *cannot* be bound by next friend concessions, but that Hamdi *must be so bound*, for the reason that he allegedly was seized in a foreign zone of active combat operations. *See ante* at 342 n. 2. But in attempting the salvage, Judge Wilkinson himself comes very close (although he does not realize it) to outright conceding the indefensibility of the point, because the binding character of a next friend concession obviously does not turn upon whether the concession is or is not made on behalf of an individual allegedly seized abroad, or even an individual seized abroad in a foreign theater of battle. Nor does the separation of powers have anything to do with this necessary legal fact. And even if the binding character of a next friend concession somehow did turn upon the location of the petitioner's seizure, the principle would cut in precisely the opposite direction from that believed by Judge Wilkinson: the alleged concession might be binding upon one seized domestically with whom the next friend is in unfettered contact, but presumptively would never be binding upon one seized abroad and held incommunicado.

In tacit recognition that these belated arguments as to the fact of concession and the legal acceptability of third-party fact concessions ring hollow, Judge Traxler (notably speaking only for himself) suggests finally that the panel would have reached the same outcome in this case even had it not concluded that the place of seizure was undisputed. *See ante* at 355 ("Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case."). I do not know quite how to respond to this statement, because I am in no position to say that, irrespective of what the panel wrote, it would not have decided the case differently had it concluded that the location of seizure was disputed. All that I, the parties, and the public can do is reason inferentially from the opinion for the court, which the panel did write. And based upon that opinion, while Judge Traxler may now in hindsight characterize the supposed concession by Hamdi's next friend as insignificant, the panel opinion he co-authored treats it as anything but. The opinion well speaks for itself in rebuttal to this suggestion. Said the panel, in emphasized words that Judge Traxler would have us overlook today, the concession of seizure in a combat zone made in the petition is "crucial to our analysis." Hamdi III, 316 F.3d at 471.

Thus, while Judge Traxler may now want to say that the panel would decide the case no differently absent a concession, he is faced with self- contradiction to so maintain, given that the opinion he co-authored went out of its way to denominate as "crucial" to its analysis the concession that it mistakenly believed was made. The unavoidable inference to be drawn from such a characterization of fact dispositively ***366** relied upon is not, as Judge Traxler would now have it, that absent that fact, the disposition would still be the same, but rather, that the disposition reached on the strength of that fact quite likely would be different if the fact were otherwise.

2.

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Unable to shore up the foundation of the panel's opinion, that Hamdi's next friend conceded that Hamdi was seized in a zone of active combat operations and bound Hamdi to that fact, Judge Traxler attempts to shift the focus away from the panel's opinion and the ultimate legal issue entirely, by erecting and then attacking a series of straw man arguments he ascribes to this dissent. Thus, he suggests that I argue that the facts alleged in the petition should be taken as false, *ante* at 348-349, and that I am "attempt[ing] to rewrite the case history and the substance of the habeas claim." *ante* at 349. Of course, I make no such arguments. I make the simple point that the petition does not affirmatively concede capture in a foreign combat zone, a fact that Judge Traxler now admits, *see ante* at 346.

Judge Traxler next argues that I have unfairly stated that neither party has attempted to defend the significance of the place of capture, *ante* at 355- 356. Again, I make no such statement. What I have stated is that neither party assigned any legal significance to the argument relied on by the panel that the locus of capture was "undisputed." (And, given the record as I have recited it herein, it is unsurprising that they did not.) But to remove the source of my objection from all doubt, and as I explain more fully below, it is *not* the panel's reliance on the place of capture that troubles me. Rather, it is the panel's indefensible reliance on an assumed concession by the petitioner, as opposed to a proffer by the government, to establish this "fact."

In his final attempt to shift the focus to a criticism that I have not made, but to which response is easier, Judge Traxler asserts that I am criticizing the panel for issuing a narrow, as opposed to a broad, holding. *See ante* at 355. As I have quite clearly said, however, the panel's error in my view was not in its search for a narrower ground, but rather in the unpersuasiveness of the putatively narrower ground on which it ultimately relied--a concession by Hamdi as to the place of his seizure. Not only is this narrower ground of concession factually unpersuasive, it is also unpersuasive as a matter of law, for the reasons Judge Motz and I have set forth.

3.

When all is said and done, then, Judge Traxler's writing today both confirms the vulnerabilities inherent in the panel's opinion he seeks to defend and puts the lie to the panel's assertion that, by grounding its decision on the reputed concession by Hamdi's next friend, it *both* provided Hamdi meaningful judicial review *and* protected the President's Article II powers to determine who and who are not enemies of the United States.

As to the former, not only does he admit that there is no such explicit concession as the panel believed, but he is forced as well to acknowledge that there is not even legal support for the panel's unexamined supposition that a next friend can actually concede a dispositive fact without even the petitioner's knowledge. As to the latter, his analytical admissions betray well that Hamdi was not provided the meaningful judicial review that he was promised. And, through his attempt to discount the importance of the supposed concession to the panel's disposition, he only draws attention ***367** to the pivotal importance of that supposed concession and thereby to the trifling deference the panel accorded the President of the United States in his determinations of who constitute enemies of our Country. A more forceful explanation of the grounds for dissent I could not make.

II.

Because of the overarching importance of the opinion of law that resolves the issue presented by this appeal, because of the panel opinion's dismissiveness of the substantial interests at stake in this case for both citizen and government, and because of the analytical vulnerability of the court's opinion as it stands, I believe that both the United States and the petitioner would be served by reconsideration by our full court.

Upon reconsideration, we should decide the critical issue of the appropriate standard that is to govern the Judiciary's review of an individual's challenge to an Executive designation of enemy combatant status, the indecision of which by the panel I believe fails to serve the substantial interests of not only the parties but also the public in the resolution of this issue. Having decided the governing standard, we should decide the issue of whether that standard has been satisfied in this case by the government's proffer of the facts contained in the Michael H. Mobbs affidavit, the like indecision of which by the panel also, I believe, fails to serve the parties and the public.

III.

Although I reserve ultimate judgment because of the difficulty of the issue and because I write in dissent from the request to rehear the case and therefore without the benefit of argument, I believe, as to the standard of review, that the government may be correct that

> [p]roper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in [*Ex parte*] *Quirin*[, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942)] and [*In re*] *Territo*, [156 F.2d 142 (9th Cir.1946),] and raised by the petition in this case. At most, however[ ] ... a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant.

Br. of Respondents-Appellants at 28 (internal citation omitted); *see also id.* at 36 ("[T]o prevail under a constitutionally appropriate standard, the government would at most need to provide some factual basis for supporting the military's determination that Hamdi is an enemy combatant."). That is, I believe that the President of the United States may well be entitled under the Constitution to receive from the Judiciary the deference afforded by a standard selected from those along this continuum, when, in exercise of the powers conferred upon him by Article II of the Constitution, he designates a person as an enemy combatant against this Nation.

As to the application of the standard to the facts proffered by the government in support of the Executive's designation of Hamdi as an enemy combatant, I reserve ultimate judgment for the same reasons. I am prepared to say, however, that I would likely conclude, as argued by the United States, that the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard for the President's ***368** designation of an enemy of the United States.

This affidavit states that Hamdi traveled to Afghanistan in the summer of 2001, where he promptly affiliated with a Taliban military unit and received weapons training. It further states that during a battle between the Taliban and the Northern Alliance later that year, Hamdi's Taliban unit surrendered to Northern Alliance forces. It continues that Hamdi was directed to surrender his Kalishnikov assault rifle (*i.e.*, AK-47) to Northern Alliance forces and was subsequently imprisoned. The affidavit represents that, while in prison, Hamdi was determined by the United States military screening team to meet the criteria for enemy combatants over whom the United States was taking control. And finally, the affidavit relates that in January 2002, a Detainee Review and Screening Team established by the Commander of the United States Central Command reviewed Hamdi's record and determined again that he met the criteria established by the Secretary of Defense for individuals over whom United States forces should take control and transfer to Guantanamo Bay.

In addition to these declarations made under penalty of perjury by the appointed representative of the government, the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security.

The panel's contrary holding notwithstanding, I suspect that more than this would be unnecessary to affirm the President's decision to designate Hamdi an enemy of the United States.

In all events, I believe that it is the obligation of this court to decide these issues that have been presented to us by the United States and by one of its citizens. At times, judicial avoidance of the difficult and the politically charged is the more prudent and the more faithful to the judicial role, both. This is a case in which it is neither.

* * * * * * * * * * *

For the reasons set forth, I would grant the suggestion for rehearing *en banc*. Accordingly, I respectfully dissent from the court's denial of that suggestion.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing en banc:

For more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He has not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world.

Precedent dictates that we must tolerate some abrogation of constitutional rights if Hamdi is, in fact, an enemy combatant. However, a panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs--an unelected, otherwise unknown, government "advisor,"--"standing alone" (subject to no challenge by Hamdi or court-ordered verification) is "sufficient as a matter of law to allow meaningful judicial review" and approval of the Executive's designation of Hamdi as an enemy combatant. *See* *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003). I cannot agree.

To justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, ***369** the panel allows appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case *en banc*.

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I.

The panel's decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.

The rights provided in the Constitution to each American citizen include the right to due process of law and to petition for a writ of habeas corpus. U.S. Const. amend. V; art. I, § 9. Unquestionably, the availability of habeas relief extends to detention pursuant to the Executive's military authority. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21, 18 L.Ed. 281 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946). Just as clearly, the responsibility for ensuring that individuals detained by the Executive receive the due process guarantees of the Constitution, including the right to petition for habeas corpus, rests with the courts. *See In re Yamashita*, 327 U.S. 1, 9, 66 S.Ct. 340, 90 L.Ed. 499 (1946). As the Supreme Court has explained, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S.Ct. 190, 77 L.Ed. 375 (1932); *see Duncan*, 327 U.S. at 322-23, 66 S.Ct. 606; and the "government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

The panel acknowledges as much, conceding that "[t]he duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict" and that "detention of United States citizens must be subject to judicial review." *Hamdi*, 316 F.3d at 464. Further, the panel recognizes that Hamdi, "an American citizen currently detained on American soil," is entitled to petition for a writ of habeas corpus and that habeas proceedings "naturally contemplate[ ] the prospect of factual development." *Id.* at 470, 473. The panel even recognizes the inadequacy of the sole "evidence" the Executive has proffered to support its enemy combatant designation of Hamdi-- the Mobbs declaration--for it admits that "a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency." *Id.* at 473. Yet, the panel concludes that "no ... factual inquiry on our part is necessary or proper" and that "Hamdi is not entitled to challenge the facts presented ... the Mobbs declaration." *Id.* at 473, 476.

The panel suggests that this conclusion accords with precedent. *See id.* at 475 ("this same issue arose in *Quirin* ... the *Quirin* principle applies here"). In fact the Supreme Court has *never* held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942), the Court did hold that for ***370** a violation of the laws of war, even an American citizen could be treated as an "enemy combatant" and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*

Thus, in *Quirin*, a German-born soldier, who claimed to be an American citizen, stipulated that after receiving payment by the German government and instruction by the "German High Command to destroy war industries and war facilities in the United States," he and six other German soldiers secretly landed in the United States during World War II with "a supply of explosives." *Id.* at 20-21, 63 S.Ct. 2. Only after finding that these "conceded facts" demonstrated "plainly" that the soldiers were within the "boundaries of the jurisdiction of military tribunals," did the Supreme Court reject their contention that they could not be tried by a military commission. *Id.* at 46, 63 S.Ct. 2. Critical to the case at hand, the Court first expressly rejected the Executive's argument that the soldiers, "must be denied access to the courts because they are enemy aliens who have entered our territory." *Id.* at 24-25, 63 S.Ct. 2. Instead, each of the soldiers was permitted, with the assistance of counsel, to file his *own* (not a next friend) petition for a writ of habeas corpus, which the courts reviewed to ensure that each soldier was in fact an enemy combatant. *Id.*

None of the few other Supreme Court cases addressing the rights of enemy combatants involved American citizens. But even when dealing with the claims of German and Japanese citizens detained by military authorities outside the United States during World War II, the Court has never suggested that an enemy combatant is without recourse to challenge that designation in court. On the contrary, the Court has held that a resident alien--who, the Court specifically noted, has far less status than those, like Hamdi, who enjoy the "high privilege" of citizenship--*can* challenge the Executive's designation of him as an enemy. *Johnson v. Eisentrager*, 339 U.S. 763, 770, 775, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (internal quotation marks and citation omitted). As the Court explained: "*Courts will entertain his plea* for freedom

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from Executive custody only *to ascertain* the existence of a state of war and *whether he is an alien enemy*." *Id.* at 775, 70 S.Ct. 936 (emphasis added); *see also id.* at 784-85, 70 S.Ct. 936; *Ludecke v. Watkins*, 335 U.S. 160, 171 n. 17, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) (noting that "whether the person restrained is in fact an alien enemy ... may also be reviewed by the courts"); *Yamashita*, 327 U.S. at 8, 66 S.Ct. 340 (noting that "[t]he courts may inquire whether the detention complained of is within the authority of those detaining the petitioner" and "the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power" to inquire whether the "Constitution or laws of the United States withhold authority" from a military tribunal).

Moreover, the Supreme Court has upheld the Executive's designation of a person as an enemy alien or enemy combatant only when presented with *facts* supporting this designation--facts stipulated by the petitioner with the advice of counsel, as in *Quirin*, or facts proved by the prosecution at a military trial in which the petitioner was afforded counsel, as in *Yamashita*. In the case at hand, no facts have been presented to support the Executive's designation. The Executive has not permitted Hamdi to consult with counsel or challenge the allegations contained in the Mobbs declaration. And Hamdi has certainly not stipulated to anything. Denied the most basic procedural protections, Hamdi could ***371** not possibly mount a challenge to the Executive's designation of him as an enemy combatant. Yet in *Eisentrager*, *Ludecke*, and *Yamashita* the Supreme Court has explained that even aliens are entitled to precisely this right. Thus, far from supporting the panel's position, controlling precedent prohibits its approach.

II.

Without any acknowledgment of its break with precedent, the panel embarks on a perilous new course--approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as "incomplete[ ]" and "incorrect[t]" hearsay. *Hamdi*, 316 F.3d at 473. My good colleagues' opinion, although well-intentioned and replete with compelling declarations of separation-of-powers principles with which no one would quarrel, utterly fails to set forth an adequate rationale for its breathtaking holding.

Indeed, the panel offers only a single justification for its unprecedented decision to permit the Executive to support its designation of Hamdi as an enemy combatant with pure hearsay: Hamdi's capture in a "zone of active combat" was assertedly "undisputed." *See Hamdi*, 316 F.3d at 459 ("*Because it is undisputed* that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold the submitted declaration is ... sufficient." (emphasis added)); *id.* at 476 ("Hamdi is not entitled to challenge the facts presented in the Mobbs declaration," because he "has been designated an enemy combatant and *it is undisputed* that he was captured in a zone of active combat operations abroad." (emphasis added)). According to the panel, this apparently all-important fact is "undisputed" because "Hamdi's petition places him squarely within the zone of active combat." *Id.* at 474; *see also id.* at 460-61.

This is a thin reed on which to rest abrogation of constitutional rights, and one that collapses entirely upon examination. For Hamdi has never been given the opportunity to dispute any facts. The "facts" as to the place of Hamdi's "capture" could only be "undisputed" by reliance on a facially innocuous statement in a petition filed by Hamdi's father, as his "next friend." Thus, the panel determines that a petition filed by a next friend on behalf of, but without access to or consultation with, the petitioner constitutes a binding admission by the petitioner that results in the forfeiture of the petitioner's constitutional rights. This holding flatly contravenes venerable Supreme Court precedent. The Court long ago held that "a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of" the represented party. *Kingsbury v. Buckner*, 134 U.S. 650, 680, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); *see also White v. Miller*, 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921 (1895) (same); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir.1940) (collecting cases). [FN1]

FN1. Judge Wilkinson contends in his concurrence to the order denying rehearing *en banc* that these cases do not apply to Hamdi because he is an enemy combatant who is not entitled to rights "enjoyed by ordinary civil or criminal litigants." *See ante* at 342 n. 2. This reasoning is dizzyingly circular. The panel relied heavily on an admission of Hamdi's next friend (who had no opportunity to consult with Hamdi) to find Hamdi an enemy combatant. Now, Judge Wilkinson maintains that *because* Hamdi is an enemy combatant, *White* and *Kingsbury* do not apply, and Hamdi is bound by his next friend's assertedly critical admission. *Id.* Thus, Judge Wilkinson seeks to use the panel's conclusion (that Hamdi is an enemy combatant) to justify the panel's improper reliance on an admission of Hamdi's next friend, which provides the very basis for that conclusion. In sum, according to Judge

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Wilkinson, because Hamdi's next friend made a purportedly devastating admission, Hamdi forfeits all rights to challenge that admission, and ultimately all constitutional rights. Surely this does not constitute the "meaningful judicial review" that the panel promised. *See* Hamdi, 316 F.3d at 462, 473.

Nor does the district court opinion, Hall v. Hague, 34 F.R.D. 449 (D.Md.1964), relied on by Judge Traxler in his concurrence, *ante* at 350, offer support for the panel's startling approach. In Hall, a district judge merely determined that the guardian *ad litem* of a minor could admit certain housekeeping matters prior to trial, on the understanding that "[a] *t the trial*, the judge will be able to tell if any unjustified admissions have been made and take appropriate action." Id. at 449-50 (internal quotation marks and citation omitted) (emphasis added). This is a long way from holding, as the panel does (ignoring Kingsbury and White), that a statement in a petition filed by Hamdi's next friend constitutes an admission by Hamdi providing the basis for denial of his constitutional rights and indefinite imprisonment, *without the benefit of any trial*. Indeed, Judge Traxler's assertion that "there is no reason to believe that [Hamdi's] rights are being bargained away or that a factual mistake is being made," in the next friend petition, *ante* at 349 n. 7, ignores the obvious. How could there be any "reason to believe that rights are being bargained away or that a factual mistake is being made" when the only person who could offer such a reason or contest a factual mistake--Yaser Esam Hamdi--has never been given the chance to do so? By keeping Hamdi imprisoned incommunicado, the Executive has denied him this opportunity. Thus, we simply have no idea whether his "rights are being bargained away" or "a factual mistake is being made." It is precisely to avoid resolving an individual's fate on such uncertain grounds that the Supreme Court has held that a next friend petition "cannot be excepted to for insufficiency, nor can any admission ... be binding." White, 158 U.S. at 146, 15 S.Ct. 788.

***372** Just as importantly, even if the statement in his father's petition that "[w]hen seized," Hamdi "resided in Afghanistan," J.A. 9, somehow translated into Hamdi's admission that he was captured "in a zone of active combat," Hamdi, 316 F.3d at 459, this should not render the Executive's designation of enemy combatant status irrebuttable. The ramifications of such a holding are chilling. Pursuant to the panel's decision, for example, any of the "embedded" American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [FN2] could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an "enemy combatant." Indeed, under the panel's holding, any American citizen seized in a part of the world where American troops are present--*e.g.*, the former Yugoslavia, the Philippines, or Korea--could be imprisoned indefinitely without being charged with a crime or afforded legal counsel, if the Executive asserted that the area was a zone of active combat. [FN3] Thus, the only basis for relying on a hearsay declaration to approve ***373** the Executive's designation of Hamdi as an enemy combatant, *i.e.*, Hamdi's assertedly "undisputed capture[ ] in a zone of active combat," is in truth a chimera and certainly provides no justification for the panel's extraordinary holding.

FN2. I note that in a letter to Senator Patrick Leahy, contained in the record, but ignored by the panel, Hamdi's father, in fact, states that his son went to Afghanistan less than two months before September 11, 2001 to do "relief work," was "trapped in Afghanistan once that military campaign began," could not have received military training, and was never an enemy combatant. J.A. 153-54.

FN3. I find puzzling the contention that the panel opinion "does not speak to the issue of whether an 'enemy combatant' may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations," *ante* at 354-355. First, no basis is provided for distinguishing between the "troops ... still on the ground in Afghanistan," Hamdi, 316 F.3d at 476, and American troops "on the ground" in the former Yugoslavia, the Philippines, or Korea. Moreover, in suggesting that a person detained in one of those countries might be able to challenge the Executive's designation of that country as a zone of active military operations, the concurrence necessarily implies that the question of what constitutes such a zone is justiciable--a conclusion seemingly at odds not only with the panel opinion, *see* 316 F.3d at 476 (dismissing Hamdi's contention that hostilities in Afghanistan had ended), but also with the concurrence itself. *See ante* at 351-352 n. 9.

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Nor, as the panel implicitly acknowledges, does the two-page, nine paragraph Mobbs declaration by itself, provide such justification. The panel's assessment of the Mobbs declaration is entirely accurate: that declaration could indeed be easily and successfully "challenge[d]" as "hearsay," and "probe [d]" for "incompleteness or inconsistency." Hamdi, 316 F.3d at 473. [FN4] The declaration contains no indicia of reliability except for Mr. Mobbs' oath--which seems of minimal value given that Mr. Mobbs does not claim *any* personal knowledge of the facts surrounding Hamdi's capture and incarceration. Rather Mr. Mobbs states that his "familiar[ity]" with "the facts and circumstances" surrounding Hamdi's capture, is "[b]ased upon" his review of undisclosed and unenumerated "relevant records and reports." J.A. 61. In fact, Mr. Mobbs himself did not (perhaps could not) make the determination that Hamdi is an "enemy combatant." Instead, Mr. Mobbs can merely declare that, according to "records and reports," "Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants." J.A. 62. The Mobbs declaration does not even state what, if any, evidence this "U.S. military screening team" relied on in making that determination or whether Mr. Mobbs himself conducted any independent review of this evidence. Indeed, the declaration's statement that Northern Alliance troops initially captured Hamdi suggests that even the U.S. military does not have any first-hand knowledge of Hamdi's conduct or status in Afghanistan.

FN4. The panel twice details the statements made in the Mobbs declaration, Hamdi, 316 F.3d at 461 and 472, and the Executive forcefully contends that the declaration meets the "some evidence" standard, but the panel carefully refrains from so holding. Id. at 474.

In sum, the record provides no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant. Accordingly, a court has no basis upon which to perform its constitutional duty " 'to examine' " the " 'validity' " of the " 'reason' " for Hamdi's " 'commitment.' " *See* Ex parte Merryman, 17 F.Cas. 144, 150 (C.C.Md.1861) (noting " 'the absolute necessity of expressing upon every commitment the reason for which it is made, [and] that the court, upon a habeas corpus, may examine into its validity' " (quoting 3 Blackstone, Commentaries 133, 134)). Thus, although the panel steadfastly maintains that it engages in a "meaningful judicial review," *see* Hamdi, 316 F.3d at 462, 473, its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review. [FN5]

FN5. Moreover, while I applaud the panel's attempt to confine its holding to the facts at hand, without effect on the rights of citizens captured on American territory, *see* Hamdi, 316 F.3d at 465, similar attempts to constrain judicial holdings have proved unavailing. As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), to the specific facts of that case, *see* id. at 101-02, 105, 63 S.Ct. 1375, the Court later determined that *Hirabayashi* dictated the holding in Korematsu v. United States, 323 U.S. 214, 218, 65 S.Ct. 193, 89 L.Ed. 194 (1944). *See* id. at 247, 65 S.Ct. 193 (Jackson, J., dissenting) ("The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding."). I fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, even one captured on American soil, who the Executive designates an "enemy combatant," as long as the Executive asserts that the area in which the citizen was detained was an "active combat zone," and the detainee, deprived of access to courts and counsel, cannot dispute this fact.

***374** At the same time, I hasten to note that the total inadequacy of the Executive's proffer and the panel's review here does not provide license for a searching judicial inquiry into the factual circumstances of every detainee's capture, or require compliance with a production order as demanding as that called for by the district court. [FN6] Such an approach could hamper the Executive's ability to wage war, as the panel explains at length. *See* Hamdi, 316 F.3d at 469-473. But the possibility, no matter how real, that an improperly conducted judicial inquiry could impair the Executive's ability to wage war cannot, as the panel seems to believe, provide a justification for holding that the Executive can indefinitely detain an American citizen (even one captured in a zone of active hostilities) without producing any credible evidence that the citizen is an "enemy combatant." The Constitution gives Congress, not the Executive and not the courts, the power to suspend the writ of habeas corpus when the public safety requires it. U.S. Const. art. I, § 9. Absent a suspension of the writ, the Constitution demands that we strike the proper balance between ensuring the Executive's ability to wage war effectively *and* protecting the individual rights guaranteed to all American citizens. *See* Yamashita, 327 U.S. at 8, 66 S.Ct. 340. Without such a balance,

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our system of ordered liberty will indeed ring hollow.

FN6. Although I agree with the panel that the district court's production order required too much, the experienced district judge should be commended nonetheless. For, during wartime and in the face of opposition by representatives of a President enjoying record popular support, the district judge has courageously attempted to provide the meaningful judicial review that the Constitution mandates, however unpopular the case.

Thus, in contrast to the panel's holding, which effectively transforms the asserted "fact" of being captured in a zone of active hostilities into an *irrebuttable* presumption of "enemy combatant" status, [FN7] a court could regard such a "fact" as creating a *rebuttable* presumption, thereby shifting the burden to Hamdi (and others like him) to establish that he was *not* an "enemy combatant." The burden of persuasion would then be on Hamdi, with the aid of counsel, to proffer affirmative evidence of his "non-combatant" status. This would seem to be the course dictated by precedent.

FN7. Notwithstanding Judge Traxler's contention, nineteenth and early twentieth century takings cases do not support the panel's *de facto* creation of this irrebuttable presumption to justify Hamdi's indefinite imprisonment. *Cf. ante* at 351. Those cases, upholding the wartime destruction or seizure without compensation of *property* outside the United States, including property owned by U.S. citizens, do broadly note that "[i]n war, all residents of [an] enemy country are enemies." *Lamar v. Browne*, 92 U.S. 187, 194, 23 L.Ed. 650 (1875). But *no liberty* rights of U.S. citizens were at issue in any of those cases or their progeny. *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 305-306, 29 S.Ct. 385, 53 L.Ed. 520 (1909); *Lamar*, 92 U.S. at 194. Indeed, the Supreme Court has never held that an American citizen becomes an "enemy" and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.

Alternatively, if the Executive produced the "relevant records and reports" on *375 which Mr. Mobbs relied in making his declaration, a court might be able to assure itself of the legitimacy of the Executive's designation. (Of course, the possibility that the "relevant records" pertaining to Hamdi's detention might contain *no evidence* that he was an "enemy combatant" is precisely the reason why judicial review is necessary.) The Department of Defense has obviously already compiled and collected these records. Producing them for judicial review, *ex parte* and *in camera* if necessary, would not in any way hamper the Executive's ability to wage war. Indeed, the Executive has apparently already made similar productions in other cases. *See Padilla v. Bush*, 233 F.Supp.2d 564, 608 (S.D.N.Y.2002); *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va.2002). Such evidence might suffice to substantiate the Executive's designation. [FN8]

FN8. In *Padilla*, now certified for interlocutory appeal to the Second Circuit, the district court ruled that it would apply the "some evidence" standard suggested by the Executive, once Padilla--with the assistance of counsel--"presents any facts he may wish to present to the court" regarding his designation as an enemy combatant. *Padilla*, 233 F.Supp.2d at 608, 610; *Padilla v. Rumsfeld*, 256 F.Supp.2d 218 (S.D.N.Y.2003) (granting government's motion to certify orders in case for interlocutory appeal).

But in all events, the Executive must offer more than hearsay to support that designation; and so in answer to the question certified to us-- "[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yasser Esam Hamdi's classification as an enemy combatant?"--the answer must be, "No."

III.

In conclusion, I must note that I have no doubt that, in this time of great challenge for our Nation, the Executive has acted in good faith when designating Hamdi an enemy combatant. Under our Constitution, however, it is the responsibility of the courts to ensure that American citizens are not deprived of liberty without due process of law, regardless of the personal belief of any individual judge concerning the integrity of the Executive. As the Framers well understood, the Executive branch must be subjected to checks on its power if individual liberties are to be preserved. *See Duncan*, 327 U.S. at 322-23, 66 S.Ct. 606; *see also United States v. Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

But one need not refer back to the time of the Framers

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to understand that courts must ... vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu*, a case in which the Supreme Court sanctioned the military internment of thousands of American citizens of Japanese ancestry during World War II. *See* 323 U.S. at 219, 65 S.Ct. 193. In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the Executive's conviction of Korematsu for simply remaining in his home, in violation of the military internment order. *See id.* at 215-16, 65 S.Ct. 193.

Of course, history has long since rejected the *Korematsu* holding. Indeed, Congress itself has specifically repudiated *Korematsu*, recognizing that "a grave injustice was done to" those "of Japanese ancestry by th[e] actions ... carried out without adequate security reasons and ... motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 App. U.S.C.A. § 1989a(a) (West 1990). But in truth, here, as in *Korematsu*, the Executive has failed to *376 proffer any real evidence to justify its action. When presented with no basis for reviewing the Executive's designation that an American citizen is an enemy combatant, other than the assurance of a Defense Department "advisor" that someone in the United States military made this determination, a court must demand more. *Cf. Korematsu*, 323 U.S. at 245, 65 S.Ct. 193 (Jackson, J., dissenting) ("So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination.").

The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and "more subtle blow to liberty." *Id.* at 245-46, 65 S.Ct. 193 (Jackson, J., dissenting). For although the incommunicado imprisonment of Hamdi will hopefully terminate some day, the panel opinion rationalizing this imprisonment will live on. As Justice Jackson warned, when the Executive "overstep[s] the bounds of constitutionality, ... it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Id.* at 246, 65 S.Ct. 193.

Courts have no higher duty than protection of the individual freedoms guaranteed by our Constitution. This is especially true in time of war, when our carefully crafted system of checks and balances must accommodate the vital needs of national security while guarding the liberties the Constitution promises all citizens. *See id.* at 234, 65 S.Ct. 193 (Murphy, J., dissenting) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."). I believe that our court has failed in this case to carry out this most important responsibility. I would require a greater showing from the Executive before I would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer.

It is for all of these reasons that I respectfully dissent from the court's denial of rehearing *en banc*. [FN9]

FN9. Contrary to Judge Wilkinson's suggestion in his concurrence, I do not question that Articles I and II delegate decisions as to the conduct of war and national defense to the Executive and Legislative branches of our government, and that we owe deference to those decisions. But deference to the political branches does not compel the Judiciary to abdicate its own duty to protect the individual liberties guaranteed all citizens. My disagreement with the panel decision is that Hamdi has not received the meaningful judicial review to which the panel acknowledges he is entitled. Such review is possible only if the Executive is required to substantiate its contentions that Hamdi is an enemy combatant with more than a declaration that the panel concedes is hearsay, inconsistent and incomplete. Even in the darkest days of World War II, after the devastating attack on Pearl Harbor, the Supreme Court recognized a greater role for the courts in safeguarding individual liberties than the panel now provides Hamdi. *See, e.g., Quirin*, 317 U.S. at 46, 63 S.Ct. 2. After all, "[i]mplicit in the term 'national defense' is the notion of defending those values and ideals which set the Nation apart." *Robel*, 389 U.S. at 264, 88 S.Ct. 419. I regret that in the name of deference to the political branches' preeminence in matters of war, the panel permits the subversion of the very liberties that make defense of this Country worthwhile.

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IN THE

SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

FRANK W. DUNHAM, JR.
Federal Public Defender
Eastern District of Virginia
Counsel of Record
GEREMY C. KAMENS
Assistant Federal Public Defender
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

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No. 03-6696

IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for Writ of Certiorari to the
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REPLY BRIEF FOR PETITIONERS

Because of concerns about the separation of powers, the Fourth Circuit has refused to conduct any meaningful review of the military's indefinite detention of an American citizen who is being held effectively incommunicado. This remarkable holding implicates the basic meaning of the rule of law.

Petitioner Yaser Hamdi, an American citizen currently imprisoned in a South Carolina brig, has been detained for more than two years by the military. On the basis of no more than their own unilateral statement that Mr. Hamdi is an "enemy combatant," the military has thus far successfully asserted the right to imprison him indefinitely and deny him access to the civil courts in operation a short distance away.

Encouraged by the Court of Appeals' ruling, Respondents continue to assert that their unilateral factual determination that Petitioner is an "enemy combatant" is the first and final word

regarding the legality of Mr. Hamdi's imprisonment. (Br. in Opp. 16-18, 18 n.7, 21.) According to Respondents, because alleged enemy combatants of any stripe may be denied a due process right to be heard in accordance with statutorily prescribed procedures, *see* 28 U.S.C. §§ 2241, 2243, 2246, American citizens unilaterally classified as enemy combatants may be denied these rights as well.

These arguments turn the separation of powers on its head. Indeed, the Court of Appeals' decision is inconsistent with the very design of the federal government "into distinct and separate departments" as a "security . . . to the rights of the people." The Federalist No. 51. By permitting the military to act as the judge of its own cause, the decision below has emboldened the Executive branch, weakened the judiciary, and threatened the elemental constitutional protections of the citizen. If left unreviewed by this Court, the Fourth Circuit's decision will mark a new and unrestrained Executive power entirely contrary to the Constitution and the careful limitation drawn by Congress on the Executive's ability to detain American citizens without charges or access to counsel.

While Respondents ostensibly agree that judicial review is constitutionally required, (Br. in Opp. 15), they only allow for a review that would permit the judiciary to do nothing more than rubber-stamp the Executive branch's classification of Petitioner as an enemy combatant. *Id.* at 17. In short, Respondents rely on their own designation of Mr. Hamdi as an enemy combatant to circumscribe the very proceedings designed to review that designation. Dissenting from the denial of rehearing below, Judge Motz aptly described such reasoning as "dizzyingly circular." (Pet. App. 63a n.1) (Motz, J., dissenting from denial of rehearing).

The questions raised by the Petition are not about the rights of a citizen who is acknowledged to be an enemy soldier. They are about the right of an American citizen who has been called an enemy combatant to challenge that classification in an independent forum. Review by this Court is

essential to confirm—within the Fourth Circuit[1] and elsewhere—that our system of divided government is one in which the power to indefinitely detain is separated from the power to judge, in a forum governed by due process, whether that indefinite detention is lawful. Respondents' arguments do not obviate the extraordinary need for this Court to address the fundamental issues raised by this case.

I. This Case Presents Issues of National Importance

Because Mr. Hamdi was purportedly seized within an undefined "zone of active combat" and because Respondents have represented that Petitioner is an "enemy combatant" based on facts set forth in a hearsay declaration by government bureaucrat Michael Mobbs, the Fourth Circuit held that "further judicial inquiry [into the propriety of Mr. Hamdi's detention is] unwarranted." (Pet. App. 27a.) As the Petition explains (at 14-19), the Fourth Circuit's failure to define what constitutes a "zone of active combat," as well as its refusal to permit a challenge to the Executive branch's factual allegations underlying the determination that Mr. Hamdi is an "enemy combatant," sanction a virtually unconfined power by the Executive branch to imprison citizens indefinitely without formal charge, access to counsel, or the ability to be heard.[2]

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[1] As noted in the Petition, (Pet. 13 n.9), the government is holding all three alleged "enemy combatants" within the United States at a special facility in South Carolina constructed for that purpose.

[2] The Fourth Circuit's holding that Petitioner could not challenge the facts upon which his detention is based effectively eliminated any litigation-related basis for communication between counsel and Petitioner. Accordingly, the recent decision by the Department of Defense—one day before the Brief in Opposition in this case was due—to permit counsel to have access to Petitioner, (Br. in Opp. 25-26 n.11), highlights the errors worked by the Fourth Circuit's premature resolution of this case. Even now that the Defense Department has agreed to allow Mr. Hamdi to meet with counsel, the Fourth Circuit's ruling leaves no room for Petitioner to participate in his habeas corpus proceeding even if such access had been allowed from the outset. Respondents, it is worth noting, pointedly do not suggest that the DOD's decision moots any issues in this case. *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 & n. 10 (1982) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he

Respondents' sole response to the enormous implications of the Fourth Circuit's decision is to suggest that the ruling is limited in scope because it is "painstakingly grounded on the particular circumstances of Hamdi's detention," (Br. in Opp. 13), and "carefully tailored to the detention of the battlefield combatant at issue in this case." *Id.* at 38. In fact, the Fourth Circuit's holding is entirely untethered to any facts that are particular to Mr. Hamdi's case.

Indeed, the Court of Appeals' ruling declined to engage in any inquiry into the factual basis for Mr. Hamdi's designation as an "enemy combatant" based on its fear that such an inquiry would violate the separation of powers between the branches of government. (Pet. App. 25a.) Because it engaged in "absolutely no judicial inquiry into the facts on the basis of which the government designated [Mr. Hamdi] as an enemy combatant," (Pet. App. 55a) (Luttig, J., dissenting from denial of rehearing), the Fourth Circuit's decision leaves American citizens who are allegedly found within a "zone of active combat" entirely vulnerable to unreviewable indefinite detention by the Executive branch.

Moreover, because the Fourth Circuit provided no definition of the term "zone of active combat," effectively leaving it up to the discretion of the Executive branch, the decision authorizes indefinite unreviewable detention of American citizens without charges by the Executive in almost any location that contains military forces or that is potentially subject to terrorist attack. In the case of another alleged "enemy combatant" seized within the United States, for example, Respondents contend that the entire United States is a battlefield. Nov. 17, 2003, Tr. at 89 l.15-19, *Padilla v. Rumsfeld*, No. 03-2235 (2d Cir. 2003) (attached); *accord* Mark Hamblett, *Tough Questions for U.S. on Detention*, Legal Times, Nov. 24, 2003, at 12. Furthermore, Respondents are already using the

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defendant free to return to his old ways.'") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Fourth Circuit's decision to argue against that petitioner's right to raise factual challenges to his detention and have access to counsel, and in support of deference to the Executive branch's "enemy combatant" determination in that case. Br. of Resp.-Appellant at 40-48, *Padilla v. Rumsfeld*, No. 03-2235 (2d Cir. 2003) (attached).

As Judge Luttig's dissent from the denial of rehearing makes clear, the Fourth Circuit's panel opinion neither rested upon an evaluation of the specific facts in the record nor accurately relied upon the habeas corpus petition to establish the location of Mr. Hamdi's seizure. (Pet. App. 56a-58a) (Luttig, J.).[3] Respondents' argument that the Fourth Circuit's decision is precisely limited in its scope, therefore, is an entirely inaccurate description of the ruling by the Court of Appeals.

II. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedents

A. The Separation of Powers Does Not Preclude Article III Courts From Reviewing Military Seizures Made During Wartime

The foundation of the Fourth Circuit's ruling is that the separation of powers doctrine precludes the judiciary from inquiring into the propriety of the Executive branch's determination that Petitioner is an enemy combatant because he was purportedly seized within an active zone of combat incident to the Executive's exercise of its war powers.[4] But in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), this Court reviewed just such a decision with respect to a citizen's property. Specifically, the Court rejected the military's claim that it seized the plaintiff's property because "the

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[3] In fact, because Petitioner was not permitted access to counsel, he could not possibly make any legally dispositive concession as to the legality of his detention. *See* (Pet. App. 58a) (Luttig, J.); (Pet. App. 63a) (Motz, J.).

[4] The panel opinion's reliance on the location of Mr. Hamdi's seizure in the context of the separation of powers doctrine is a point that "neither party attempted to defend" below. (Pet. App. 54a) (Luttig, J.). For this reason, Petitioners had no occasion to cite *Mitchell v. Harmony* in the briefing before the Fourth Circuit.

plaintiff was engaged in trading with the enemy" within Mexico during the Mexican-American war. *Id.* at 132-33.

Respondents seek to distinguish *Harmony* on the ground that it involved a civil suit over the seizure of a citizen's property and that the action was brought "after the hostilities in Mexico had ended." (Br. in Opp. 31.) As an initial matter, this Court in *Harmony* did not rely upon the cessation of hostilities with Mexico as a prerequisite for judicial review any more than the court in *In re Territo* refrained from holding an evidentiary hearing before the official conclusion of World War II. *Compare In re Territo*, 156 F.2d 142 (9th Cir. 1946), *with Lee v. Madigan*, 358 U.S. 228, 230 (1959) (noting that official state of war with Germany concluded on October 19, 1951), and Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. 1245, 1369, 49 U.N.T.S. 3 (effective Sep. 15, 1947). Moreover, Respondents' arguments discounting *Harmony* would suggest that courts possess greater authority to review the seizure of a citizen's property in a damages action than to review the propriety of the seizure of the citizen himself by means of the Great Writ. If anything, the opposite is true. *Cf.* (Pet. App. 66a n.7) (Motz, J.) ("[T]he Supreme Court has never held that an American citizen becomes an 'enemy' and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.").[5]

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[5] Respondents' response to Petitioner's Suspension Clause claim is simply that "the shape of this habeas proceeding must reflect the unique circumstances in which it arises . . . ." Br. in Opp. at 22-23. As noted above, this circular argument rests upon Respondents' assertion that Mr. Hamdi is an enemy combatant, and ignores Petitioner's argument that the Suspension Clause preserves a broad scope of review in cases of executive detentions. In fact, federal courts have long entertained habeas corpus petitions by individuals alleged to be prisoners of war. *See In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946); *In re Fagan*, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4,604) ("The writ of habeas corpus had long been in frequent use, in a great variety of cases. . . . [including those by] persons detained under military authority as soldiers or prisoners of war."); *In re McDonald*, 16 F. Cas. 17, 79 (E.D. Mo. 1861) (No. 8,751) (holding that Missouri militiaman seized by Union forces was entitled to seek relief by means of habeas corpus); *cf.* James McPherson, *Battle Cry of Freedom* 290-92 (1988) (describing battles between pro-southern Missouri militiamen and Union soldiers). What is important for purposes of Petitioner's claim, however, is not the type of relief that was

Nonetheless, the seizure of property by the military is just as integral to the war power as is the seizure of enemy soldiers. *See, e.g., Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947) ("There is no doubt but that under the war power, . . . the United States may confiscate enemy property."); *Lamar v. Browne*, 92 U.S. 187, 194 (1875) ("It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men."); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) ("War gives an equal right over persons and property."). And, this Court's decision in *Harmony* illustrates that the separation of powers doctrine does not preclude judicial review of a military seizure overseas that occurred during wartime. The Fourth Circuit's ruling to the contrary thus conflicts with that decision.

B. Whether a Citizen May Be Held as an Enemy Combatant Is Not a Political Question

Respondents' assertion that the determination as to whether Petitioner is an enemy combatant is a political question or a "quintessential military judgment," Br. in Opp. at 16, is squarely rejected by this Court's precedents. In fact, this Court made an independent determination that the petitioner in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), was not a prisoner of war.

In *Milligan*, like in this case, the military claimed that the location of seizure "in a military sense, constituted . . . the theatre of military operations . . . [because] Indiana had been and was again threatened with invasion by the enemy." 71 U.S. (4 Wall.) at 126. The military also maintained that Milligan was held as a prisoner of war. *Id.* at 131. Neither of these arguments, of course, precluded this Court from examining the circumstances in Milligan's case.

Hirota v. MacArthur, 338 U.S. 197 (1948) (Douglas, J., concurring), cited by Respondents, is entirely inapposite. In the aftermath of World War II, the President entered into an agreement with

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available under the common law but the scope of review applied to claims of executive detention.

the Allied Powers to establish an international military tribunal to try high military and civilian officials in the Japanese government for war crimes. Because the President had "made arrangements with other nations for [the petitioners'] trial," Justice Douglas concluded that "he act[ed] in a political role on a military matter." *Id.* at 209. Having been convicted by an international tribunal, the former Japanese officials and military officers therefore could not seek redress in United States courts.

Even in the context of an international war crimes tribunal, however, Justice Douglas stated that if the petitioners were American citizens, they would be able to seek habeas corpus review in a federal court. *Id.* at 205 ("I cannot believe that we would adhere to [the belief that the Court has no authority to review the judgment of an international tribunal] if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation."). In no way did Justice Douglas suggest that the classification of a citizen in a manner that would subject him to indefinite detention could ever be a political question.

Respondents also maintain that only the military is institutionally capable of making the determination regarding Mr. Hamdi's "enemy combatant" status. Br. in Opp. at 17. That is incorrect. As the Fourth Circuit acknowledged, "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." Pet. App. 24a. The logic of the court's statement not only undercuts Respondents' notion of their own institutional capability, but it also underscores the breathtaking nature of a Court of Appeals' opinion that—while acknowledging the potential for error—authorizes the unchallengeable and indefinite detention of citizens by the Executive.

Within the relatively secure context of the United States, the determination as to Mr. Hamdi's status should be fully reviewed by federal courts. Indeed, federal courts are perfectly able to evaluate evidence as to Mr. Hamdi's status. *See Milligan*, 71 U.S. (4 Wall.) at 131; *United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002). Furthermore, independent factual inquiry by the judiciary is most important in a case like this in which the military has failed to implement its own military regulations—even after the District Court offered Respondents that opportunity (Pet. 9 n.7)—and denied Mr. Hamdi a hearing as to whether he is in fact an enemy combatant or simply a civilian who, for example, was turned over to the United States by the Northern Alliance for a bounty.[6]

C. The Court of Appeals' Decision Failed to Provide Constitutionally Adequate Access to the Courts

Respondents assert that Petitioners have raised an "access to courts" claim "[f]or the first time in this case" in the Petition for Certiorari, and that Petitioner has received constitutionally-adequate access to the courts. Br. in Opp. 33. Respondents are wrong on both counts.

Petitioners presented the precise argument contained in the instant Petition for Certiorari in Respondents' prior interlocutory appeal in this case challenging the District Court's order permitting counsel to have access to Petitioner. Br. of Pet'r's/Appellees at 14 n.5, *Hamdi v. Rumsfeld*, 296 F.3d

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[6] *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) (J.A. 91-126) ("EPW Regulations"). The EPW Regulations are designed to "implement international law," including the Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 ("GPW"). EPW Reg. 1-1(b) (J.A. 95). Pursuant to these regulations, "[i]n accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." EPW Reg. 1-6 (J.A. 96.). Had the Executive branch followed the GPW and its own EPW Regulations requiring such a tribunal, the District Court, in reviewing Petitioner's detention, likely would have had access to much of the information it found necessary for meaningful judicial review.

278 (4th Cir. 2002) (No. 02-6895). Indeed, Petitioners cited both *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989), and *Ex parte Hull*, 312 U.S. 546, 549 (1941), in support of the argument that Mr. Hamdi was entitled by virtue of the Due Process Clause to access to courts. Accordingly, the issue remains available for review now that the case has been finally decided. *See United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). This has always been the rule in this Court. *See, e.g., Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-84 (1897).

Moreover, Respondents' complaint that this claim was not developed below is disingenuous in light of the procedural history of this case. Following an interlocutory appeal in which the Fourth Circuit reversed a District Court order that required Respondents to grant Petitioner access to counsel, the Fourth Circuit remanded the case for further proceedings and directed the District Court to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002). The Fourth Circuit plainly considered allowing Mr. Hamdi to have access to counsel an "intrusive measure" that was to be avoided. In fact, following the remand, the Fourth Circuit bluntly ordered the District Court to consider the sufficiency of the Mobbs declaration first as "an independent matter" before the district court considered any other questions in the case, including whether Petitioner should have access to counsel. (J.A. 149.)

Consequently, on remand, the District Court refused to consider any issues other than the sufficiency of the Mobbs Declaration. *See* Aug. 21, 2002, Order at 5-7 (J.A. 468-70) ("Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determination of Hamdi's

status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court 'consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further.'"). The only issue addressed by the District Court and certified for interlocutory review thus involved the sufficiency of the Mobbs Declaration to support the detention, not the merits of Petitioner's claims.[7]

Nonetheless, during the latest interlocutory appeal—at oral argument as well as in the briefing before the Fourth Circuit—Petitioner continued to assert that Mr. Hamdi's imprisonment violated the Due Process Clause and that Mr. Hamdi must have the opportunity to have access to counsel and the courts. *See* Oct. 28, 2002, Tr. of Oral Argument before 4th Cir. ("If habeas corpus is to mean anything, it means that the man has to be given an opportunity to confront the allegations against him and it means that he should have counsel in order to do that.") (attached); Br. of Pet'r's/Appellees at 53, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) ("By imposing imprisonment, perhaps indefinitely, without process, Respondents continue to violate the Due Process Clause of the Fifth Amendment."). Nothing more was required to preserve this issue. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

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[7] The Court of Appeals therefore had no jurisdiction to consider any issues aside from those addressed by or fairly included within the District Court's August 16, 2002, Order. *United States v. Stanley*, 483 U.S. 669, 677 (1987) ("Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court . . ., that jurisdiction *is* confined to the particular order appealed from."); 9 Wright, Miller, & Cooper, *Fed'l Practice & Procedure* § 3929 (2d ed. 1996) ("Even more clearly the court of appeals will not consider matters not yet ruled upon by the district court."); 19 *Moore's Fed'l Practice* § 203.32[3][a] at 203-103 (3d ed. 1997) (same).

III. The Court of Appeals' Decision Is Contrary to a Congressional Statute, the Constitution, and Applicable Treaties and Regulations

A. Respondents assert that Congress has endorsed the indefinite and incommunicado detention of Mr. Hamdi, and that 18 U.S.C. § 4001(a) has no application to this case. Respondents are wrong.

As the Petition explains, § 4001(a) reflects a long-standing principle that the Executive branch possesses no unilateral authority to determine when citizens may be detained indefinitely without charge. Respondents' effort to limit the application of § 4001(a) ignores the plain language of the statute providing that "[n]o *citizen* shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." § 4001(a)(emphasis added). The unambiguous language of this statute, enacted in 1971, serves as the beginning and end of judicial construction. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).[8]

Section 4001(a) explicitly prohibits the long-term detention of citizens "except pursuant to an Act of Congress," and no congressional act has authorized Mr. Hamdi's indefinite detention. Although Respondents and the Court of Appeals point to the general authorization for the use of force in Afghanistan and an appropriations provision related to prisoners of war, (Pet. App. 18a); (Br. in Opp. 27), neither of the statutes cited contain any language authorizing the indefinite detention of citizens. Respondents' argument that § 4001(a)'s "Act of Congress" requirement is satisfied by these statutes also makes little sense. Enacted in the wake of embarrassment over the treatment of Japanese-American citizens in the United States during World War II, § 4001(a) was

[8] The Executive has no authority outside of the criminal context to engage in the long-term detention of citizens. Because § 4001(a) simply reflects this longstanding principle, it can have no effect on the war powers. As for the statute's application overseas, this case does not present that question of statutory construction. *Cf. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

not designed to allow declarations of war, much less statutory authorizations for the use of force or appropriations provisions, to serve as a green light for the Executive to detain citizens.

Furthermore, Respondents fail to respond to the precedents evidencing this Court's rigorous scrutiny of statutes that purport to authorize military control over citizens. (Pet. 38-39.) Although Respondents correctly point out that *Ex parte Endo*, 323 U.S. 283, 297-98 (1944), did not involve "military law," i.e., challenges to "the jurisdiction of military tribunals," *id.*, neither does this case. This Court held in *Endo* that implicit powers drawn from statutes that are silent "on the power to detain" "must be narrowly confined to the precise purpose of" the statute, and that such powers can "place no greater restraint on the citizen than was clearly and unmistakably indicated by the [statutory] language." *Id.* at 300-02. Accordingly, neither the authorization for the use of force in Afghanistan nor an appropriation for prisoner of war facilities can be relied upon to suggest that Congress meant to sanction the indefinite and unreviewable detention of a citizen at issue here.

B. Even in the unlikely event that Congress by its authorization for the use of force in Afghanistan had authorized the military to detain citizens, it did nothing to take away Petitioner's right to challenge (1) the factual basis upon which his detention is predicated; (2) the imposition of punishment without process; and (3) the failure to afford Petitioner protections under the Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 ("GPW"), and the military's EPW Regulations. Respondents assert that "the special context in which this case arises – wartime detention of combatants, not criminal punishment – significantly diminishes the due process rights that Hamdi enjoys." Br. in Opp. at 23. Once again, however, Respondents' argument rests upon their unilateral determination that Mr. Hamdi is an enemy combatant.

Regardless of the context in which this case arises, Petitioner cannot be deprived of the most basic procedural protection due, the opportunity to be heard, without eviscerating Petitioner's rights

under the Due Process Clause.[9] Moreover, Petitioner has been given few of the benefits afforded to prisoners of war that form the premise of Respondents' argument that his detention is a "simple war measure" and, as such, that it constitutes "neither punishment nor an act of vengeance." (Br. in Opp. 14) (quoting Pet. App. 16a.) Petitioner's "exclusion from human associations" itself has long been considered a "punishment of the most important and painful character," and a violation of the Due Process Clause. *See In re Medley*, 134 U.S. 160, 168-71 (1890).

Echoing the Fourth Circuit, Respondents contend that the GPW gives no protection to Petitioner because the treaty is non-self-executing. Respondents also argue that Mr. Hamdi is not entitled to a tribunal under Article 5 of the GPW because no doubt exists whether Mr. Hamdi is entitled to prisoner of war status. These arguments are meritless.

As the Petition (Pet.31 n.16) and amici[10] point out, the Fourth Circuit failed to recognize that 28 U.S.C. § 2241 itself provides a cause of action to seek redress for treaty violations.[11] Furthermore, the President's unilateral declaration that Taliban detainees are not entitled to GPW protections—a point that was not relied upon by the Fourth Circuit —does not establish that "no doubt" exists as to Petitioner's entitlement to the protections of the GPW. *See* George H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 897-98

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[9] Respondents note that Petitioners "have made clear that they are not challenging Hamdi's initial capture and detention in Afghanistan." (Br. in Opp. 19.) The difference between such a claim and Petitioner's challenge to his indefinite detention is analogous to the difference between a Fourth Amendment challenge to the reasonableness of an initial seizure and a Fifth Amendment challenge to the lawfulness of a long-term deprivation of liberty.

[10] *See* Brief of *Amici Curiae* Former Prisoners of War and Experts on the Law of War in Support of Petitioners at 9-10.

[11] *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978), cited by Respondents (Br. in Opp. at 28) and the Fourth Circuit (Pet. App. 19a), is inapposite because the Sixth Circuit found that the plaintiffs could not assert claims under § 2241 until they had exhausted their state remedies. *Id.* at 633.

(2002). In any event, under U.S. regulations, "all persons detained by the United States Armed Forces receive prisoner of war protection regardless of whether they are entitled to prisoner of war status under the [Geneva Conventions]." Capt. Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 Army Lawyer 16, 17 (Aug. 1994) (citing EPW Regulations ¶ 1-5). Respondents are required by law to follow these regulations. *See* (Pet. 31 n.16) (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

The recent decision by the Department of Defense to allow Petitioner to have access to counsel is evidence that the prospect of review by this Court has had a salutary effect on the Executive's conduct. Unless this Court accepts review of this case, however, that effect will vanish—along with any prospect of a judicious and reasoned determination as to the propriety of Mr. Hamdi's indefinite detention.

IV Conclusion

The petition for a writ of certiorari should be granted.

FRANK W. DUNHAM, JR.
Federal Public Defender
for the Eastern District of Virginia

Frank W. Dunham, Jr.
Federal Public Defender
Counsel of Record
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

December 17, 2003

(25)

No. 03-6696

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
JAN - 5 2003

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD, W. R. PAULETTE, Commander,
Respondents.

PROOF OF SERVICE

I, Frank W. Dunham, Jr., do swear or declare that on this 5th day of January, 2004, as required by Supreme Court Rule 29, I have served the enclosed SUPPLEMENTAL BRIEF FOR PETITIONERS on each party to the above proceeding or that party's counsel, and on every other person required to be served, by delivering to Federal Express, billed to sender, an envelope containing the above documents.

The names and addresses of those served are as follows:

Paul Clement, Deputy Solicitor General
Office of the Solicitor General of the United States
U.S. Department of Justice, Room 5614
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2203

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5th, 2004

Frank W. Dunham, Jr.

DERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA
1650 KING STREET, SUITE 500
ALEXANDRIA, VIRGINIA 22314
TEL: (703) 600-0800
FAX: (703) 600-0880

Frank W. Dunham, Jr.
Federal Public Defender

January 5, 2004

BY HAND DELIVERY

The Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Hamdi v. Rumsfeld*, U.S. Case No. 03-6696

Dear Mr. Suter:

Pursuant to Supreme Court Rules 15 and 12.2, we have enclosed for filing one original and ten (10) copies of a Supplemental Brief for Petitioners, and one original and ten (10) copies of Proof of Service in the above-styled case. We have also enclosed one copy of each that we request be date-stamped and returned to us in the enclosed self-addressed stamped envelope. Two copies of each document have been served on the Solicitor General's Office.

If you or your staff have any questions about this submission, please do not hesitate to contact Frances Pratt, at (703) 600-0800.

Sincerely,

Frank W. Dunham, Jr.

Enclosures

cc: Paul Clement, Deputy Solicitor General

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EDITOR'S NOTE

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No. 03-6696

IN THE SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **SUPPLEMENTAL BRIEF FOR THE RESPONDENTS** by first-class mail, postage prepaid, this **7th day of January 2004.**

[See Attached Service List]

Theodore B. Olson
Solicitor General
Counsel of Record

January 7, 2004

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

ATTACHMENT

Only the Westlaw citation is currently available.

United States Court of Appeals,
Second Circuit.

Jose PADILLA, Donna R. Newman, as Next Friend of Jose Padilla, Petitioner-
Appellee-Cross-Appellant,
v.
Donald RUMSFELD,
Respondent-Appellant-Cross-Appellee.

No. 03-2235(L), 03-2438(CON.).

Argued: Nov. 17, 2003.
Decided: Dec. 18, 2003.

Prisoner, by his next friend, filed petition for a writ of habeas corpus challenging his detention as' an enemy combatant. Following denial of Government's motion to dismiss, 233 F.Supp.2d 564, and motion for reconsideration, 243 F.Supp.2d 42, the United States District Court for the Southern District of New York, Mukasey, C.J., 256 F.Supp.2d 218, certified various controlling questions of law, and cross-appeals were taken. The Court of Appeals, Pooler and Parker, Circuit Judges, held that: (1) attorney had sufficiently close relationship with prisoner to have standing as next friend to bring habeas petition on prisoner's behalf; (2) Secretary of Defense, rather than prisoner's immediate custodian, was proper respondent; (3) President lacked inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat; and (4) absent specific congressional authorization, Non-Detention Act prohibited President's detention of American citizen on American soil as an "enemy combatant," and Congress's Authorization for Use of Military Force Joint Resolution, passed shortly after the attacks of September 11, 2001, was not such an authorization.

Affirmed in part, reversed in part, and remanded.

Wesley, Circuit Judge, filed opinion concurring in part, dissenting in part.

[1] Habeas Corpus ⇐=0

197k0 k.

Attorney had sufficiently close relationship with prisoner who was unable to file a petition on his own behalf because he was being held incommunicado as "enemy combatant" because of alleged terrorist ties to have standing as next friend to bring habeas petition on prisoner's behalf; attorney had preexisting relationship with prisoner that directly involved his apprehension and confinement before he was taken into custody by Defense Department (DOD), and she was perhaps the only person aware of his wishes when he was taken into custody by the DOD, and nothing in the record called into question her suitability to pursue those wishes. 28 U.S.C.A. § 2242.

[2] Habeas Corpus ⇐=0
197k0 k.

A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. 28 U.S.C.A. § 2242.

[3] Habeas Corpus ⇐=0
197k0 k.

A next friend resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another. 28 U.S.C.A. § 2242.

[4] Habeas Corpus ⇐=0
197k0 k.

Secretary of Defense, rather than prisoner's immediate custodian, was proper respondent in habeas proceeding brought on behalf of prisoner held in Navy brig as "enemy combatant" because of his alleged terrorist ties; Secretary was charged by the President with detaining prisoner, sent Defense Department (DOD) personnel to take custody of prisoner, and Secretary or his designees determined that prisoner would be sent to brig in South Carolina. 28 U.S.C.A. § 2241.

[5] Federal Courts ⇐=0
170Bk0 k.

Breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located. Fed.Rules Civ.Proc.Rule 4(k)(1)(A), 28 U.S.C.A.

[6] Habeas Corpus ⇐=0
197k0 k.

Secretary of Defense was amenable to process under New York's long-arm statute in prisoner's habeas proceeding challenging his detention in South Carolina as an "enemy combatant;" all of the activities salient to prisoner's claim were completed or initiated by Secretary or his agents in the Southern District of New York where Secretary sent Defense Department (DOD) personnel to remove prisoner from New York facility, detain him, and transfer him to South Carolina. McKinney's CPLR 302.

[7] United States ⇐=0

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393k0 k.

When the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

[8] United States ⇐=0
393k0 k.

When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

[9] United States ⇐=0
393k0 k.

Where the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

[10] War and National Emergency ⇐=0
402k0 k.

President lacked inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat. U.S.C.A. Const.Art. 2, § 2.

[11] War and National Emergency ⇐=0
402k0 k.

Whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts.

[12] War and National Emergency ⇐=0
402k0 k.

When the Executive acts, even in the conduct of war, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. U.S.C.A. Const.Art. 2, § 2.

[13] United States ⇐=0
393k0 k.

Propriety of a given branch's conduct does not turn on the labeling of activity as "legislative" or "executive;" legislative action depends not on form but upon whether it contains matter which is properly to be regarded as legislative in its character and effect, and thus, court must look to whether the exercise of power in question has been subject to the carefully crafted restraints spelled out in the Constitution to ensure that authority is exercised only by the branch to which it has been allocated.

[14] War and National Emergency ⇐=0
402k0 k.

Non-Detention Act applies to both civilian and military detentions. 18 U.S.C. § 4001(a).

[15] War and National Emergency ⇐=0
402k0 k.

Absent specific congressional authorization, Non-Detention Act prohibited President's detention of American citizen on American soil as an "enemy combatant," and Congress's Authorization for Use of Military Force Joint Resolution, passed shortly after the attacks of September 11, 2001, was not such an authorization. 18 U.S.C. § 4001(a).

[16] War and National Emergency ⇐=0
402k0 k.

President's detention of American citizen on American soil as an "enemy combatant" was not authorized by statute allowing the use of appropriated funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of [the Armed Services] pursuant to Presidential proclamation." 10 U.S.C. § 956(5).
Donald Rumsfeld, the Secretary of Defense, and Jose Padilla, by his next friend Donna R. Newman, Esq., cross-appeal on questions certified by the District Court for the Southern District of New York (Mukasey, C.J.) arising from a petition for a writ of habeas corpus filed on behalf of Padilla challenging his detention as an enemy combatant.

Affirmed in part, reversed in part, and remanded. Judge Wesley dissents in part in a separate opinion.

Paul D. Clement, Deputy Solicitor General, Washington, D.C. (David B. Salmons, Sri Srinivasan, Assistants to the Solicitor General, Jonathan L. Marcus, Attorney, Department of Justice, Washington, D.C., James B. Comey, United States Attorney for the Southern District of New York, Eric B. Bruce, Christine H. Chung, Assistant United States Attorneys, New York, NY, on the brief), for Respondent-Appellant-Cross-Appellee.

Donna R. Newman, Andrew G. Patel, New York, NY, for Petitioner-Appellee- Cross-Appellant.

Jenny S. Martinez, Stanford, CA; David W. DeBruin,

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Donald B. Verrilli, Jr., Sharon M. McGowan, Jenner & Block LLC, Washington, D.C., for Amici Curiae Hon. John J. Gibbons, Hon. Nathaniel R. Jones, Hon. Abner J. Mikva, Hon. William A. Norris, Hon. H. Lee Sarokin, Hon. Harold R. Tyler, Jr., Donald Francis Donovan, Scott Greathead, Robert E. Juceam, Philip Allen Lacovara, Robert Todd Lang, Robert M. Pennoyer, Barbara Paul Robinson, and William D. Zabel in support of Petitioner.

Alfred P. Carlton, Jr., American Bar Association; John Payton, Seth P. Waxman, Paul R.Q. Wolfson, Kate Hutchins, Jonathan H. Siegelbaum, Jerrod C. Patterson, Chicago, IL, for Amicus Curiae American Bar Association in support of Petitioner.

Steven R. Shapiro, American Civil Liberties Union Foundation; Arthur N. Eisenberg, New York Civil Liberties Union Foundation; Lucas Guttentag, Robin L. Goldfaden, Jonathan L. Hafetz, American Civil Liberties Union Foundation Immigrants' Rights Project, New York, NY, for Amici Curiae American Civil Liberties Union and New York Civil Liberties Union in support of Petitioner.

Benito Romano, Joseph G. Davis, Mary Eaton, Willkie Farr & Gallagher, New York, NY, for Amicus Curiae Association of the Bar of the City of New York in support of Petitioner.

Jonathan M. Freiman, Lawyers Committee for Human Rights, New Haven, CT; Wiggin & Dana LLP, New Haven, CT, for Amici Curiae The Cato Institute, The Center for National Security Studies, The Constitution Project, The Lawyers Committee for Human Rights, People for the American Way, and The Rutherford Institute in support of Petitioner.

Barbara J. Olshansky, Jules Lobel, Michael Ratner, Shayana Kadidal, Nancy Chang, Jennifer Green, Center for Constitutional Rights, New York, N.Y. for Amici Curiae Center for Constitutional Rights, Asian American Legal Defense and Education Fund, Center for Human Rights & Constitutional Law, National Lawyers Guild, National Immigration Project of the National Lawyers Guild, National Lawyers Guild Maurice & Jane Sugar Law Center for Economic & Social Justice, Unitarian Universalist Service Committee, et al. in support of Petitioner.

Allison Marston Danner, Nashville, TN, for Amici Curiae Experts on the Law of War in support of Petitioner.

Wallace A. Showman LLP, New York, NY, for Amici Curiae Law Professors in support of Petitioner.

Joshua L. Dratel, Joshua L. Dratel, P.C., New York, NY; Donald G. Rehkopf, Jr., Law Office of Brenna & Brenna, Rochester, NY, for Amici Curiae National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers in support of Petitioner.

Edward M. Shaw, New York Council of Defense Lawyers; Richard A. Greenberg, New York Council of Defense Lawyers, New York, NY, for Amicus Curiae The New York Council of Defense Lawyers in support of Petitioner.

James W. Klein, Giovanna Shay, Timothy P. O'Toole, Public Defender Service, Washington, D.C., for Amicus Curiae Public Defender Service for the District of Columbia in support of Petitioner.

Rachel H. Wolkenstein, Paul Cooperstein, New York, NY, for Amici Curiae Spartacist League and Partisan Defense Committee in support of Petitioner.

Daniel J. Popeo, Richard A. Samp, Washington Legal Foundation, Washington, D.C., for Amici Curiae Washington Legal Foundation, Allied Educational Foundation, and U.S. Representatives Walter Jones, Lamar Smith, and John Sweeney in support of Respondent.

Before: POOLER, B.D. PARKER and WESLEY, Circuit Judges.

POOLER and B.D. PARKER, Circuit Judges.

INTRODUCTION

***1** This habeas corpus appeal requires us to consider a series of questions raised by Secretary of Defense Donald Rumsfeld and by Donna R. Newman, Esq., on behalf of Jose Padilla, an American citizen held by military authorities as an enemy combatant. Padilla is suspected of being associated with al Qaeda and planning terrorist attacks in this country. The questions were certified by the United States District Court for the Southern District of New York (Michael B. Mukasey, *C.J.*) and involve, among others: whether the Secretary of Defense is Padilla's "custodian" for habeas purposes, whether the Southern District of New York had jurisdiction over the petition, and whether the President has the authority to detain Padilla as an enemy combatant. We conclude that the Secretary of Defense is a proper respondent and that the District Court had jurisdiction. We also conclude that Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.

As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

Where, as here, the President's power as Commander-in-Chief of the armed forces and the domestic rule of law intersect, we conclude that clear congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001(a) (2000) (the "Non-Detention Act") prohibits such detentions absent specific congressional authorization. Congress's Authorization for Use of Military Force Joint Resolution, Pub.L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"), passed shortly after the attacks of September 11, 2001, is not such an authorization, and no exception to section 4001(a) otherwise exists. In light of this express prohibition, the government must undertake to show that Padilla's detention can nonetheless be grounded in the President's inherent constitutional powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 72 S.Ct. 863, 96 L.Ed. 1153 (Jackson, *J.*, concurring). We conclude that it has not made this showing. In reaching this conclusion, we do not address the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003) ("*Hamdi III* "). Nor do we express any opinion as to the hypothetical situation of a congressionally authorized detention of an American citizen.

***2** Accordingly, we remand to the District Court with instructions to issue a writ of habeas corpus directing Secretary Rumsfeld to release Padilla from military custody within 30 days, at which point the government can act within its legislatively conferred authority to take further action. For example, Padilla can be transferred to the appropriate civilian authorities who can bring criminal charges against him. If appropriate, he can also be held as a material witness in connection with grand jury proceedings. *See United States v. Awadallah*, 349 F.3d 42 (2d Cir.2003). Under any scenario, Padilla will be entitled to the constitutional protections extended to other citizens. [FN1]

BACKGROUND

I. The Initial Detention

On May 8, 2002, Jose Padilla, an American citizen, flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. There he was arrested by FBI agents pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York in connection with a grand jury investigation of the terrorist attacks of September 11. Padilla carried no weapons or explosives. [FN2]

The agents brought Padilla to New York where he was held as a civilian material witness in the maximum security wing of the Metropolitan Correctional Center (MCC). At that point, Padilla was under the control of the Bureau of Prisons and the United States Marshal Service. Any immediate threat he posed to national security had effectively been neutralized. On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent Padilla. Newman "conferred with [Padilla] over a period of weeks in ... an effort to end [his] confinement." *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564, 576 (S.D.N.Y.2002) (*"Padilla I "*). She also conferred with Padilla's relatives and with government representatives on Padilla's behalf.

On May 22, Newman moved to vacate the material witness warrant. By June 7, the motion had been submitted for decision. A conference on the motion was scheduled for June 11. However, on June 9, the government notified the court ex parte that (1) it wished to withdraw its subpoena and (2) the President had issued an Order (the "June 9 Order") designating Padilla as an ~~enemy combatant~~ and directing Secretary Rumsfeld to detain him. Chief Judge Mukasey vacated the warrant, and Padilla was taken into custody by Department of Defense (DOD) personnel and transported from New York to the high-security Consolidated Naval Brig in Charleston, South Carolina. At the scheduled June 11 conference, Newman, unable to secure Padilla's signature on a habeas corpus petition, nonetheless filed one on his behalf as "next friend."

For the past eighteen months, Padilla has been held in the Brig in Charleston. He has not been permitted any contact with his counsel, his family or any other non-military personnel. During this period he has been the subject of ongoing questioning regarding the al Qaeda network and its terrorist activities in an effort to obtain intelligence.

II. The Order Authorizing the Detention

***3** In his June 9 Order, the President directed Secretary Rumsfeld to detain Padilla based on findings that Padilla was an enemy combatant who (1) was "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; (2) had engaged in "war-like acts, including conduct in preparation for acts of international terrorism" against the United States; (3) had intelligence that could assist the United States to ward off future terrorist attacks; and (4) was a continuing threat to United States security. As authority for the detention, the President relied on "the Constitution and ... the laws of the United States, including the [Joint Resolution]." [FN3]

In an unsealed declaration submitted to the District Court, Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy (who claims no direct knowledge of

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Padilla's actions or of the interrogations that produced the information discussed in his declaration), set forth the information the President received before he designated Padilla as an enemy combatant. According to the declaration, Padilla was born in New York, was convicted of murder in 1983, and remained incarcerated until his eighteenth birthday. In 1991, he was convicted on a handgun charge and again sent to prison. He moved to Egypt in 1998 and traveled to several countries in the Middle East and Southwest Asia between 1999 and 2000. During this period, he was closely associated with known members and leaders of al Qaeda. While in Afghanistan in 2001, Padilla became involved with a plan to build and detonate a "dirty bomb" within the United States, and went to Pakistan to receive training on explosives from al Qaeda operatives. There he was instructed by senior al Qaeda officials to return to the United States to conduct reconnaissance and or other attacks on behalf of al Qaeda. He then traveled to Chicago, where he was arrested upon arrival into the United States on May 8, 2002. Notwithstanding Padilla's extensive contacts with al Qaeda members and his actions under their direction, the government does not allege that Padilla was a member of al Qaeda.

The government also offered for the District Court's review Mobbs' sealed declaration, which the District Court characterized as "identifying one or more of the sources referred to only in cryptic terms in the [unsealed] Mobbs Declaration" and "set[ting] forth objective circumstantial evidence that corroborates the factual allegations in the [unsealed] Mobbs Declaration." *Padilla I*, 233 F.Supp.2d at 609. [FN4]

III. District Court Proceedings on the Habeas Petition

On June 26, 2002, the government moved to dismiss Padilla's habeas petition on the grounds that Newman lacked standing to act as Padilla's next friend, that Secretary Rumsfeld was not a proper respondent, and that, in any event, the District Court lacked personal jurisdiction over him. On the merits, the government contended that each Mobbs declaration contained sufficient evidence of Padilla's association with al Qaeda and his intention to engage in terrorist acts in this country on behalf of al Qaeda to establish the legality of holding Padilla in military custody as an enemy combatant. Padilla contended that the President lacked authority to detain an American citizen taken into custody in the United States. At a minimum, he sought access to counsel.

***4** In a comprehensive and thorough opinion, the District Court determined that (1) Newman could bring the habeas petition as Padilla's next friend; (2) Secretary Rumsfeld was a proper respondent and the District Court had jurisdiction over him; (3) the Constitution and statutory law give the President authority to detain American citizens as enemy combatants; (4) Padilla was entitled to consult with counsel to pursue his habeas petition "under conditions that will minimize the likelihood that he [could] use his lawyers as unwilling intermediaries for the transmission of information to others"; (5) Padilla could present facts and argument to the court to rebut the government's showing that he was an enemy combatant; and (6) the court would "examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention." *Padilla I*, 233 F.Supp.2d at 569-70 (S.D.N.Y.2002). The court did not rely on the sealed Mobbs declaration in making its rulings. *Id.* at 610.

The District Court's order directed the parties to set conditions under which Padilla could meet with his counsel, but Secretary Rumsfeld declined to do so. Instead, more than a month after the *Padilla I* decision, the government moved for reconsideration of the portion of *Padilla I* that allowed him access to counsel, on the ground that no conditions could be set that would protect the national security. *Padilla ex rel. Newman v. Rumsfeld*, 243 F.Supp.2d 42, 43-46 (S.D.N.Y.2003). ("*Padilla II* "). Although Chief Judge Mukasey expressed doubts as to the procedural regularity of the motion, he nonetheless entertained it on the merits and denied it. *Id.* at 48-49, 57.

The government then moved for certification of the issues which it had lost. Chief Judge Mukasey certified the following questions as "involv[ing] ... controlling question[s] of law as to which there is substantial ground for difference of opinion" and the resolution of which "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2000); *Padilla ex rel. Newman v. Rumsfeld*, 256 F.Supp.2d 218, 222-23 (S.D.N.Y.2003) ("*Padilla III* "):

> (1) Is the Secretary of Defense, Donald Rumsfeld, a proper respondent in this case?
> (2) Does this court have personal jurisdiction over Secretary Rumsfeld?
> (3) Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda?
> (4) What burden must the government meet to detain petitioner as an enemy combatant?
> (5) Does petitioner have the right to present facts in support of his habeas corpus petition?
> (6) Was it a proper exercise of this court's discretion and its authority under the All Writs Act to direct that petitioner be afforded access to counsel for the purpose of presenting facts in support of his petition?

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***5** *Id.* at 223.

On June 10, 2003, this Court granted the parties' application for an interlocutory appeal. [FN5]

DISCUSSION

I. Preliminary Issues

A. Next Friend Status [FN6]

[1] The first of several issues in this appeal concerns attorney Newman's standing to proceed as "next friend" on Padilla's behalf. The government contends that Newman lacks standing because next friend status is restricted to counsel with a "longstanding" connection to a detainee, and that Newman's relationship with Padilla is not sufficient. Newman, on the other hand, contends that the established attorney-client relationship, under which she represented Padilla after his arrival in New York, is adequate for next friend standing because the nature of the relationship, not simply its duration, controls.

[2][3] Next friend standing is authorized by 28 U.S.C. § 2242 (2000), which declares that a habeas petition may be brought "by the person for whose relief it is intended *or by someone acting in his behalf* ." *Id.* (emphasis added). In *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), the Supreme Court noted that next friend standing "has long been an accepted basis for jurisdiction in certain circumstances," and has most often been invoked "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Id.* at 162. "A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Id.* at 163. A next friend "resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan v. Potter*, 157 U.S. 195, 198, 15 S.Ct. 590, 39 L.Ed. 670 (1895). The availability of next friend status is, however, subject to significant limitations:

> Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation--such as inaccessibility, mental incompetence, or other disability--why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Whitmore, 495 U.S. at 163-64 (internal citations omitted). These "limitations on the 'next friend' doctrine are driven by the recognition that '[i]t was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.' " *Id.* at 164 (quoting *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir.1921)). [FN7]

***6** There is no dispute that Padilla is unable to file a petition on his own behalf--he is being held incommunicado. Similarly, there is no issue as to Newman's professional relationship with Padilla. As a member of the bar, she is, of course, duty-bound to represent Padilla and to protect his interests zealously and within the bounds of the law. *See* N.Y.Code Prof. Resp. DR 7- 101. Newman was assigned to represent Padilla when he was first brought into the Southern District and, before his transfer to military custody, she had begun to advise Padilla about the legal implications of his apprehension and confinement. From May 15 to June 9, 2002, she met with him in an effort to vacate the material witness warrant and to secure his release. She filed motions on his behalf that attacked the legal basis of his confinement, met with his family and appeared in court with him. Moreover, she was perhaps the only person aware of his wishes when he was taken into custody by the DOD, and nothing in the record before us has called into question her suitability to pursue those wishes. Finally, she has continued ably to represent him and indeed she, with others, argued this appeal on his behalf. We find this relationship to be a significant one, notwithstanding its duration. We also find it one in which Newman is neither an "intruder" nor an "uninvited meddler," *Whitmore*, 495 U.S. at 164, and, consequently, we conclude that the District Court properly approved Newman as Padilla's next friend. [FN8]

B. Jurisdictional Issues

The government argues that because the proper respondent is Padilla's immediate custodian--Commander Melanie A. Marr, the commander of the brig in South Carolina, not Secretary Rumsfeld--the petition must be dismissed or transferred to the District of South Carolina because the Southern District of New York does not have jurisdiction. The government bases this contention on 28 U.S.C. §§ 2242 and 2243, which require a petitioner to "allege ... the name of the person who has custody over him," instruct that the writ "be directed to the person having custody of the person detained," and provide that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." [FN9] The government asserts this language "indicates ... there is only one proper respondent to a habeas petition," Commander Marr, who is not within the jurisdiction of the Southern District of New York. *Vasquez v. Reno*, 233 F.3d 688, 693 (1st Cir.2000). The government's jurisdictional argument thus raises two issues:

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who is the proper respondent and whether the Southern District of New York has jurisdiction over that individual.

i. Is Secretary Rumsfeld a Proper Respondent?

[4] The government contends that in the usual habeas corpus case brought by a federal prisoner, courts have consistently held that the proper respondent is the warden of the facility, not the Attorney General. *See, e.g., Sanders v. Bennett*, 148 F.2d 19, 20 (D.C.Cir.1945). Similarly, it argues the proper respondent to a petition brought by a military prisoner challenging his confinement is the warden of the facility holding the soldier, not the Secretary of Defense. *See, e.g., Monk v. Sec'y of the Navy*, 793 F.2d 364, 369 (D.C.Cir.1986). [FN10] This traditional rule has been described as "a practical one based on common sense administration of justice." *Sanders*, 148 F.2d at 20. Relying on these principles, the government argues that the petition must be brought against Commander Marr, not Secretary Rumsfeld.

***7** But this is not the usual situation. "[W]hat makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement." *Padilla I*, 233 F.Supp.2d at 579. Thus, "[t]he warden becomes the respondent of choice almost by default." *Id.*

When habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent. "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969). Moreover, the courts "have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Lee v. United States*, 501 F.2d 494, 503 n. 9 (8th Cir.1974) (Webster, J., concurring) (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 350, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973)).

Ex parte Endo, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944), for example, involved a Japanese-American woman originally interned at Tulelake, California but later transferred to an internment camp in Utah. The Court held that her transfer did not destroy the California district court's jurisdiction over the habeas petition, because there were potential respondents--the Secretary of the Interior or national officials of the War Relocation Authority--still within the court's jurisdictional reach. *Id.* at 304-06. Rather than formalistically require that Endo's immediate physical custodian be designated as the respondent, the Court recognized the flexibility of the Writ and concluded that the petition could properly be directed against national- level officials who have power to "produce[ ]" the petitioner even though they were not the immediate custodians. *Id.* at 305. [FN11]

Similarly, in *Strait v. Laird*, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972), the Court held that Strait, a California-domiciled inactive Army reservist under the command of an Indiana-based officer, could file a habeas action against that officer in California district court. [FN12] Although Strait's military records were kept with his commanding officer at Fort Benjamin Harrison, Indiana, Strait was at all times domiciled in California and was never in or assigned to Indiana. When ordered to report to active duty at Fort Gordon, Georgia, he filed an application for discharge as a conscientious objector. His application was processed at Fort Ord, California and his superiors in California recommended discharge, but on review, the application was denied. Thereafter, Strait filed a petition for a writ of habeas corpus in California naming his commander in Indiana as the respondent. The Supreme Court held that jurisdiction was proper in California. It concluded that "virtually every face-to-face contact between [Strait] and the military occurred in California" at the direction of the Indiana officer. *Id.* at 344. Accordingly, the Court held that because the Indiana commander had the responsibility to decide whether to release Strait, he was an appropriate respondent despite the intervening level of military personnel that dealt with Strait directly.

***8** Under *Strait*' s "broad concept" of custodian, the appropriate focus was whether the respondent, through his agent, was responsible for Strait's detention. [FN13] *Strait*, however, did not calibrate the distance in the chain of command sufficient for designation as a "custodian" for habeas purposes. Although Strait named the Secretary of Defense as a respondent in addition to Strait's Indiana commanding officer, the Court did not discuss whether the Secretary was a proper respondent. In any event, it was clear there, unlike here, that the Secretary had no direct responsibility for the denial of Strait's application for conscientious objector status.

Finally, in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), Kentucky filed a detainer against Braden while he was imprisoned in Alabama on unrelated charges. The Court held that, notwithstanding his confinement in Alabama, he could file a habeas petition against Kentucky authorities in Kentucky federal district court to challenge

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Kentucky's alleged failure to grant him a speedy trial on that state's charges. [FN14] *Id.* at 500. The Court determined that 28 U.S.C. § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the *custodian* of the prisoner. The fact that "the prisoner himself [was] confined outside the court's territorial jurisdiction" was immaterial; what was dispositive was the court's jurisdiction over the "custodian." *Id.* at 495. [FN15] Importantly, the proper respondent was the entity with the power to limit the petitioner's freedom: the Kentucky authorities that filed the detainer. Simply put, Braden could not seek relief from the detainer without making the Kentucky court a party to the proceeding. [FN16]

The unique role Secretary Rumsfeld plays in this matter leads us to conclude that he is a proper respondent. Secretary Rumsfeld was charged by the President in the June 9 Order with detaining Padilla. In following that Order, the Secretary sent DOD personnel into the Southern District of New York to take custody of Padilla. Secretary Rumsfeld, or his designees, determined that Padilla would be sent to the brig in South Carolina. Although Commander Marr is the commander of the Brig, the legal reality of control is vested with Secretary Rumsfeld, since only he--not Commander Marr--could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary. In this respect, "the extraordinary and pervasive role that [Secretary Rumsfeld] played in [this] matter[ ] is virtually unique." *Henderson v. INS*, 157 F.3d 106, 126 (2d Cir.1998). [FN17] In fact, this degree of Cabinet-level involvement is unprecedented as far as we have been able to determine. Accordingly, we do not undertake to articulate a rule defining the proper respondent in a habeas case other than one involving a petitioner designated as an enemy combatant under circumstances congruent with Padilla's designation and detention. We only hold that, here, Secretary Rumsfeld is the proper respondent.

ii. Whether the Court has Jurisdiction over Secretary Rumsfeld

***9** The government argues that even if Secretary Rumsfeld were a proper respondent, he is located in the Eastern District of Virginia beyond the District Court's habeas jurisdiction, because 28 U.S.C. § 2241(a) limits district courts to issuing writs "within their respective jurisdictions," 28 U.S.C. § 2241(a), and this means that "habeas corpus jurisdiction does not extend to officials outside the court's territorial limits." *Malone v. Calderon*, 165 F.3d 1234, 1237 (9th Cir.1999). Under this analysis, long-arm jurisdiction is not applicable to habeas petitions. Newman, on the other hand, maintains that a federal district court sitting in New York has habeas jurisdiction over a non-resident "custodian" if he can be reached under the state's process--here, New York's long-arm statute. *See* N.Y. C.P.L.R. § 302 (McKinney 2003).

The Supreme Court in *Ahrens v. Clark*, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), had construed section 2241(a)'s language of "within their respective jurisdictions" to require a habeas petitioner to be physically present within the district. *See id.* at 190. But *Braden* overruled *Ahrens* and dispensed with this requirement:

> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495.

Moreover, Supreme Court law predating *Braden* supports the conclusion that habeas jurisdiction requires only that the district court have personal jurisdiction over the respondent--long-arm or otherwise. In *Strait*, the Court held that the reservist located in California could bring a habeas petition in that state against his Indiana-based commanding officer, rejecting the contention that long-arm jurisdiction does not apply in the habeas context:

> Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience.

406 U.S. at 345 (footnote omitted). The Court added:

> That such "presence" may suffice for personal jurisdiction is well settled, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, and the concept is also not a novel one as regards habeas corpus jurisdiction. In *Ex parte Endo*, 323 U.S. 283, 307, 65 S.Ct. 208, 89 L.Ed. 243, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process."

Id. n. 2. The issue, then, is whether Secretary Rumsfeld is subject to the personal jurisdiction of the Southern District of New York. *See, e.g., United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1128-29 (2d Cir.1974) (interpreting *Braden* to require only that the custodian be reachable by the state's long-arm statute).

***10** [5] The breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located. *See* Fed.R.Civ.P. 4(k)(1)(A); *United States v. First Nat'l Bank*, 379 U.S. 378, 381, 85 S.Ct. 528, 13

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L.Ed.2d 365 (1965); *Henderson*, 157 F.3d at 123. New York's long-arm statute provides that personal jurisdiction may be asserted over any non-domiciliary if, "in person or through an agent," he "transacts any business within the state" or "commits a tortious act within the state," as long as the particular cause of action asserted is one "arising from" any of those acts. N.Y. C.P.L.R. § 302(a)(1),(2) (McKinney 2003). [FN18] Its purpose was to extend the jurisdiction of New York courts over nonresidents who have "engaged in some purposeful activity [here] in connection with the matter in suit." *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). Section 302 is a single-act statute; jurisdiction attaches if the defendant engages in a single purposeful activity that has a substantial relationship or articulable nexus to the claim asserted. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 16-17, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1969); *see also Henderson*, 157 F.3d at 123. Moreover, the statute's jurisprudential gloss and its legislative history suggest that its "transacts business" clause is not restricted to commercial activity. [FN19] In fact, the advisory committee which drafted the section decided to follow the broad, inclusive language of the Illinois long-arm statute then in effect, adopting as the criterion the "[transaction of] *any* business within the state." N.Y.C.P.L.R. § 302(a)(1); Ill. Stat. Ann., ch. 110 § 17 (Smith-Hurd 1956). Its legislative history indicates that it was designed to take advantage of the "new [jurisdictional] enclave" opened up by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), where the nonresident defendant has engaged in some purposeful activity in this State in connection with the suit. *See* N.Y. Advisory Comm. Rep. (N.Y.Legis.Doc., 1958, No. 13), at 39-40. [FN20]

[6] We have little difficulty concluding that Secretary Rumsfeld is amenable to process under New York's long-arm statute. Although the Department of Justice ("DOJ") was responsible for bringing Padilla into the Southern District as a material witness and for detaining him at the MCC--a DOJ facility--all of the activities salient to Padilla's claim were completed or initiated by Secretary Rumsfeld or his agents in the Southern District of New York. Secretary Rumsfeld was charged by the President in the June 9 Order with detaining Padilla. [FN21] Pursuant to that Order, the material witness warrant was withdrawn and Secretary Rumsfeld was instructed to take custody of Padilla. Secretary Rumsfeld then sent DOD personnel into the Southern District of New York to (1) remove Padilla from the MCC, (2) detain Padilla, and (3) transfer him to South Carolina. Most importantly, Padilla's status was transformed in the Southern District--he arrived in New York a material witness in a grand jury investigation related to the September 11 attacks and departed an enemy combatant. In our opinion, these purposeful contacts of Secretary Rumsfeld with the Southern District of New York, whether personal or through agents, were substantially related to the claims asserted by Padilla and are therefore sufficient to confer personal jurisdiction over the Secretary by the District Court. *See* N.Y. C.P.L.R. § 302 (McKinney 2003); *see also Longines*, 15 N.Y.2d at 457, 261 N.Y.S.2d 8, 209 N.E.2d 68. [FN22]

II. Power to Detain

A. Introduction

***11** The District Court concluded, and the government maintains here, that the indefinite detention of Padilla was a proper exercise of the President's power as Commander-in-Chief. The power to detain Padilla is said to derive from the President's authority, settled by *Ex parte Quirin*, 317 U.S. 1 (1942), to detain enemy combatants in wartime--authority that is argued to encompass the detention of United States citizens seized on United States soil. This power, the court below reasoned, may be exercised without a formal declaration of war by Congress and "even if Congressional authorization were deemed necessary, the Joint Resolution, passed by both houses of Congress, ... engages the President's full powers as Commander in Chief." *Padilla I*, 233 F.Supp.2d at 590. Specifically, the District Court found that the Joint Resolution acted as express congressional authorization under 18 U.S.C. § 4001(a), which prohibits the detention of American citizens absent such authorization. *Id.* at 598-99. In addition, the government claims that 10 U.S.C. § 956(5), a statute that allows the military to use authorized funds for certain detentions, grants authority to detain American citizens.

These alternative arguments require us to examine the scope of the President's inherent power and, if this is found insufficient to support Padilla's detention, whether Congress has authorized such detentions of American citizens. We reemphasize, however, that our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield or while actively engaged in armed conflict against the United States. As the Fourth Circuit recently--and accurately--noted in *Hamdi v. Rumsfeld*, "[t]o compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." 337 F.3d 335, 344 (4th Cir.2003) ("*Hamdi IV* ") (Wilkinson, *J.*, concurring).

B. The Youngstown Analysis

Our review of the exercise by the President of war powers in the domestic sphere starts with the template the Supreme Court constructed in *Youngstown*, 343 U.S. at 635-38 (Jackson, *J.*, concurring). *Youngstown* involved the validity of President Truman's efforts during the Korean War to seize the country's steel mills on the eve of a nationwide strike by steelworkers. *Id.* at 582-85. Writing for the majority, Justice Black explained that the President's power "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. The Court held that the seizure could not be justified as a function of the President's Commander-in-Chief powers and that it had not been authorized by Congress. *Id.* at 587-88. Justice Jackson's concurrence, which provides the framework for reviewing the validity of executive action, posits three categories for evaluating the exercise of emergency powers by the President. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir.2002) ("*Hamdi II* ").

***12** [7][8][9] First, when the President acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, *J.*, concurring). This category is exemplified by the power exercised by the President in *Quirin* and in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Second, when the President acts in the absence of either a congressional grant or denial of authority, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain ." *Youngstown*, 343 U.S. at 637. Finally, the third category includes those situations where the President takes measures incompatible with the express or implied will of Congress. In such cases, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* The "[c]ourts can sustain exclusive presidential control [in this situation] only by disabling the Congress from acting upon the subject." *Id.* at 637-38.

Here, we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat. We also conclude that the Non-Detention Act serves as an explicit congressional "denial of authority" within the meaning of *Youngstown*, thus placing us in *Youngstown* 's third category. Finally, we conclude that because the Joint Resolution does not authorize the President to detain American citizens seized on American soil, we remain within *Youngstown* 's third category.

i. Inherent Power

[10] The government contends that the President has the inherent authority to detain those who take up arms against this country pursuant to Article II, Section 2, of the Constitution, which makes him the Commander-in-Chief, and that the exercise of these powers domestically does not require congressional authorization. Moreover, the argument goes, it was settled by *Quirin* that the military's authority to detain enemy combatants in wartime applies to American citizens as well as to foreign combatants. There the Supreme Court explained that "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces" and "[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 30-31. Finally, since the designation of an enemy combatant bears the closest imaginable connection to the President's constitutional responsibilities, principles of judicial deference are said by the government to assume heightened significance.

***13** [11] We agree that great deference is afforded the President's exercise of his authority as Commander-in-Chief. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988). We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. *See Johnson v. Eisentrager*, 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation--even by a citizen--which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *The Prize Cases*, 67 U.S. (2 Black) 635, 670, 17 L.Ed. 459 (1862). Because we have no authority to do so, we do not address the government's underlying assumption that an undeclared war exists between al Qaeda and the United States. We have no quarrel with the former chief of the Justice Department's Criminal Division, who said:

> For [al Qaeda] chose not to violate the law but to attack the law and its institutions directly. Their proclaimed goal, however unrealistic, was to destroy the United States. They used powerful weapons of destructive force and openly declared their willingness to employ even more powerful weapons of mass destruction if they could lay hold of them. They were as serious a threat to the national security of the United States as one could envision.

Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9- 11 World*, Wkly. Standard, Dec. 1, 2003, at 15.

[12] However, it is a different proposition entirely to argue that the President even in times of grave national security threats or war, whether declared or undeclared, can lay

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claim to any of the powers, express or implied, allocated to Congress. The deference due to the Executive in its exercise of its war powers therefore only starts the inquiry; it does not end it. Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). To be sure, when Congress and the President act together in the conduct of war, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." *Hirabayashi v. United States*, 320 U.S. 81, 93, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). But when the Executive acts, even in the conduct of war, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

These separation of powers concerns are heightened when the Commander-in- Chief's powers are exercised in the domestic sphere. The Supreme Court has long counseled that while the Executive should be "indulge[d] the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society," he enjoys "no such indulgence" when "it is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). This is because "the federal power over external affairs [is] in origin and essential character different from that over internal affairs," and "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Curtiss-Wright*, 299 U.S. at 319, 320. But, "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). Thus, we do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield. Rather, we are called on to decide whether the Constitution gives the President the power to detain an American citizen seized in this country until the war with al Qaeda ends.

***14** The government contends that the Constitution authorizes the President to detain Padilla as an enemy combatant as an exercise of inherent executive authority. Padilla contends that, in the absence of express congressional authorization, the President, by his June 9 Order denominating Padilla an enemy combatant, has engaged in the "lawmaking" function entrusted by the Constitution to Congress in violation of the separation of powers. In response, no argument is made that the Constitution expressly grants the President the power to name United States citizens as enemy combatants and order their detention. Rather, the government contends that the Commander-in-Chief Clause implicitly grants the President the power to detain enemy combatants domestically during times of national security crises such as the current conflict with al Qaeda. U.S. Const. art. II, § 2.

As an initial matter, we note that in its explicit vesting of powers in Articles I and II, the Constitution circumscribes and defines the respective functions of the political branches. *INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers ...."). The Constitution gives Congress the full legislative powers of government and at the same time, gives the President full executive authority and responsibility to "take care" that the laws enacted are faithfully executed. U.S. Const. art I, § 1, art. II, §§ 1, 3; *Loving v. United States*, 517 U.S. 748, 758, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) ("[T]he lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity"); *Field v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 36 L.Ed. 294 (1892). Thus, while the President has the obligation to enforce laws passed by Congress, he does not have the power to legislate.

[13] The propriety of a given branch's conduct does not turn on the labeling of activity as "legislative" or "executive." *See Mistretta v. United States*, 488 U.S. 361, 393, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Legislative action depends "not on form but upon whether [it] contain[s] matter which is properly to be regarded as legislative in its character and effect." *Chadha*, 462 U.S. at 952 (internal quotation marks omitted). Thus, we must look to whether the exercise of power in question has been "subject to the carefully crafted restraints spelled out in the Constitution," *id.* at 959, to ensure that authority is exercised only by the branch to which it has been allocated. *See Youngstown*, 343 U.S. at 587-88.

The Constitution entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive. U.S. Const. art. II, § 8, cl. 10; *United States v. Arjona*, 120 U.S. 479, 483, 7 S.Ct. 628, 30 L.Ed. 728 (1887). Padilla contends that the June 9 Order mandating his detention as an "enemy combatant" was not the result of congressional action defining the category of "enemy combatant." He also argues that there has been no other legislative articulation of what constitutes an "enemy combatant," what circumstances trigger the designation, or when it ends. As in *Youngstown*, Padilla maintains that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress--it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown*, 343 U.S. at 588.

***15** The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). Here, the Executive lays claim to the inherent emergency powers necessary to effect such abridgements, but we agree with Padilla that the Constitution lodges these powers with Congress, not the President. *See Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring).

First, the Constitution explicitly provides for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. This power, however, lies only with Congress. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 2 L.Ed. 554 (1807). Further, determinations about the scope of the writ are for Congress. *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996).

Moreover, the Third Amendment's prohibition on the quartering of troops during times of peace reflected the Framers' deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life. [FN23] *See, e.g., Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972); *Katz v. United States*, 389 U.S. 347, 350 n. 5, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). At the same time they understood that in times of war--of serious national crisis--military concerns prevailed and such intrusions could occur. But significantly, decisions as to the nature and scope of these intrusions were to be made "in a manner to be prescribed by law." U.S. Const. amend. III. The only valid process for making "law" under the Constitution is, of course, via bicameral passage and presentment to the President, whose possible veto is subject to congressional override, provided in Article I, Section 7. *See Chadha*, 462 U.S. at 946-51.

The Constitution's explicit grant of the powers authorized in the Offenses Clause, the Suspension Clause, and the Third Amendment, to Congress is a powerful indication that, absent express congressional authorization, the President's Commander-in-Chief powers do not support Padilla's confinement. *See id.* at 946. The level of specificity with which the Framers allocated these domestic powers to Congress and the lack of any even near-equivalent grant of authority in Article II's catalogue of executive powers compels us to decline to read any such power into the Commander-in-Chief Clause. In sum, while Congress--otherwise acting consistently with the Constitution--may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case, the President, acting alone, does not. [FN24] *See Youngstown*, 343 U.S. at 631-32 (Douglas, J., concurring).

The government argues that *Quirin* established the President's inherent authority to detain Padilla. In *Quirin*, the Supreme Court reviewed the habeas petitions of German soldiers captured on United States soil during World War II. All of the petitioners had lived in the United States at some point in their lives and had been trained in the German Army in the use of explosives. *See* 317 U.S. at 20-21. These soldiers, one of whom would later claim American citizenship, landed in the United States and shed their uniforms intending to engage in acts of military sabotage. They were arrested in New York and Chicago, tried by a military commission as "unlawful combatants," and sentenced to death. The Court denied the soldiers' petitions for habeas corpus, holding that the alleged American citizenship of one of the saboteurs was immaterial to its judgment: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. The government contends that *Quirin* conclusively establishes the President's authority to exercise military jurisdiction over American citizens.

***16** We do not agree that *Quirin* controls. First, and most importantly, the *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war. *Id.* at 26-28. Specifically, the Court found it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation." *Id.* at 29. [FN25] Accordingly, *Quirin* does not speak to whether, or to what degree, the President may impose military authority upon United States citizens domestically without clear congressional authorization. We are reluctant to read into *Quirin* a principle that the *Quirin* Court itself specifically declined to promulgate. [FN26]

Moreover, there are other important distinctions between *Quirin* and this case. First, when *Quirin* was decided in 1942, section 4001(a) had not yet been enacted. The *Quirin* Court consequently had no occasion to consider the effects of legislation prohibiting the detention of American citizens absent statutory authorization. As a result, *Quirin* was premised on the conclusion--indisputable at the time--that the Executive's domestic projection of military authority had been authorized by Congress. Because the *Quirin* Court did not have to contend with section 4001(a), its usefulness is now sharply attenuated.

Second, the petitioners in *Quirin* admitted that they were

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soldiers in the armed forces of a nation against whom the United States had formally declared war. The *Quirin* Court deemed it unnecessary to consider the dispositive issue here--the boundaries of the Executive's military jurisdiction--because the *Quirin* petitioners "upon the conceded facts, were plainly within those boundaries." *Id.* at 46. Padilla makes no such concession. To the contrary, he, from all indications, intends to dispute his designation as an enemy combatant, and points to the fact that the civilian accomplices of the *Quirin* saboteurs--citizens who advanced the sabotage plots but who were not members of the German armed forces--were charged and tried as civilians in civilian courts, not as enemy combatants subject to military authority. *Haupt v. United States*, 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 (1947); *Cramer v. United States*, 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441 (1945).

In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), the government unsuccessfully attempted to prosecute before a military tribunal a citizen who, never having belonged to or received training from the Confederate Army, "conspired with bad men" to engage in acts of war and sabotage against the United States. 71 U.S. at 131. Although *Quirin* distinguished *Milligan* on the ground that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, [and] not subject to the law of war," 317 U.S. at 45, a more germane distinction rests on the different statutes involved in *Milligan* and *Quirin*. During the Civil War, Congress authorized the President to suspend the writ of habeas corpus. *Milligan*, 71 U.S. at 4. However, it also limited his power to detain indefinitely "citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war." *Id.* at 5.

***17** This limitation was embodied in a requirement that the Executive furnish a list of such prisoners to the district and circuit courts and, upon request by a prisoner, release him if the grand jury failed to return an indictment. *Id.* The grand jury sitting when Milligan was detained failed to indict him. *Id.* at 7. The Court concluded that because "Congress could grant no ... power" to authorize the military trial of a civilian in a state where the courts remained open and functioning, Milligan could not be tried by a military tribunal. *Id.* at 121-22. Thus, both *Quirin* and *Milligan* are consistent with the principle that primary authority for imposing military jurisdiction upon American citizens lies with Congress. Even though *Quirin* limits to a certain extent the broader holding in *Milligan* that citizens cannot be subjected to military jurisdiction while the courts continue to function, *Quirin* and *Milligan* both teach that--at a minimum--an Act of Congress is required to expand military jurisdiction.

The government's argument for the legality of Padilla's detention also relies heavily on the Fourth Circuit's decisions in *Hamdi II* and *Hamdi III*. These decisions are inapposite. The Fourth Circuit directly predicated its holdings on the undisputed fact that Hamdi was captured in a zone of active combat in Afghanistan. *Hamdi III*, 316 F.3d at 459 ("Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that ... [n]o further factual inquiry is necessary or proper."). The court said:

> We have no occasion ... to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. We shall, in fact, go no further in this case than the specific context before us--that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country."

Hamdi III, at 465 (internal citation omitted).

The dissent also relies on *The Prize Cases*, which, like *Milligan*, arose out of the Civil War, to conclude that the President has the inherent constitutional authority to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. We believe that neither the facts of *The Prize Cases* nor their holding support such a broad construction.

First, *The Prize Cases* dealt with the capture of enemy property--not the detention of persons. The Court had no occasion to address the strong constitutional arguments against deprivations of personal liberty, or the question of whether the President could infringe upon individual liberty rights through the exercise of his wartime powers outside a zone of combat.

Second, the dissent would have us read *The Prize Cases* as resolving any question as to whether the President may detain Padilla as an enemy combatant without congressional authorization. The Court did not, however, rest its decision upholding the exercise of the President's military authority solely on his constitutional powers without regard to congressional authorization. Rather, it noted that the President's authority to "call[ ] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government" stemmed from "the Acts of Congress of February 28th, 1795, and 3d of March, 1807." *Id.* at 668. In any event, Congress's subsequent ratification of the President's wartime orders mooted any questions of presidential authority. *Id.* at 670. Finally, the Court in *The Prize Cases* was not faced with the Non-Detention Act specifically limiting the President's authority to detain American citizens absent express congressional authorization.

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***18** Based on the text of the Constitution and the cases interpreting it, we reject the government's contention that the President has inherent constitutional power to detain Padilla under the circumstances presented here. [FN27] Therefore, under *Youngstown*, we must now consider whether Congress has authorized such detentions.

ii. Congressional Acts

a. The Non-Detention Act

[14] As we have seen, the Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The District Court held that this language "encompasses all detentions of United States citizens." *Padilla I*, 233 F.Supp.2d at 597.

We review this interpretation de novo. *United States v. Lucien*, 347 F.3d 45, 50 (2d Cir.2003). In conducting our review, we must first examine the language of the statute and assume that its "ordinary meaning ... accurately expresses the legislative purpose." *Id.* at 51 (internal quotation marks omitted). If the plain language is unambiguous, "judicial inquiry ends, except in 'rare and exceptional circumstances,' and legislative history is instructive only upon 'the most extraordinary showing of contrary intentions.' " *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984)).

We read the plain language of section 4001(a) to prohibit all detentions of citizens--a conclusion first reached by the Supreme Court. *Howe v. Smith*, 452 U.S. 473, 479 n. 3, 101 S.Ct. 2468, 69 L.Ed.2d 171 (1981) (characterizing the Non-Detention Act as "proscribing detention *of any kind* by the United States" (emphasis in original)). Not only has the government not made an extraordinary showing of contrary intentions, but the legislative history of the Non-Detention Act is fully consistent with our reading of it. Both the sponsor of the Act and its primary opponent repeatedly confirmed that the Act applies to detentions by the President during war and other times of national crisis. The legislative history is replete with references to the detentions of American citizens of Japanese descent during World War II, detentions that were authorized both by congressional acts and by orders issued pursuant to the President's war power. This context convinces us that military detentions were intended to be covered. Finally, the legislative history indicates that Congress understood that exceptions to the Non-Detention Act must specifically authorize *detentions*.

Section 4001(a) was enacted in 1971 and originated as an amendment to legislation repealing the Emergency Detention Act of 1950, former 50 U.S.C §§ 811-26 (1970), which authorized the detention by the Attorney General during an invasion, a declared war, or "an insurrection within the United States in aid of a foreign enemy" of "each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812(a), 813(a) (1970). Congress referred to section 4001(a) as the Railsback amendment for its drafter, Representative Railsback. The Railsback amendment emerged from the House Judiciary Committee and was opposed by the House Internal Security Committee, which offered other alternatives.

***19** Congressman Ichord, the chair of the House Internal Security Committee and the primary opponent of the Railsback amendment, argued that it would tie the President's hands in times of national emergency or war. He characterized the amendment as "this most dangerous committee amendment" and as "depriv[ing] the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec. H31542 (daily ed. Sept. 13, 1971). Representative Ichord's alarm stemmed from his belief that *Youngstown* "teaches that where the Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner." *Id.* at H31544; *see id.* at H31549 ("I do feel that the language of the amendment drafted by [Representative Railsback] under the Youngstown Steel case would prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage.").

No proponent of the Railsback amendment challenged Representative Ichord's interpretation. In fact, in a striking exchange between Representatives Ichord and Railsback, he ratified Representative Ichord's interpretation. Representative Ichord asked: "Does [Representative Railsback] believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?" *Id.* at H31551. Representative Railsback responded, "Yes." *Id.* Representative Ichord then asked: "Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?" *Id.* Railsback answered:

> I think what would happen is what J. Edgar Hoover thought could have happened when he opposed the actions that were taken in 1942. He suggested the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions. Does the gentleman know that J. Edgar Hoover was opposed to detention camps, because

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be thought he had sufficient personnel to keep all these potential saboteurs under surveillance, and that they could prosecute the guilty in accordance with due process?

Id. at H31551-52. Railsback also suggested to Congress that the President could seize citizens only pursuant to an Act of Congress or during a time of martial law when the courts are not open. *Id.* at 31755. [FN28]

Congress's passage of the Railsback amendment by a vote of 257 to 49 after ample warning that both the sponsor of the amendment and its primary opponent believed it would limit detentions in times of war and peace alike is strong evidence that the amendment means what it says, that is that no American citizen can be detained without a congressional act authorizing the detention.

***20** In addition, almost every representative who spoke in favor of repeal of the Emergency Detention Act or adoption of the Railsback amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions. *See, e.g., id.* at H31537 (Rep.Railsback); *id.* at H31541 (Rep.Poff); *id.* at H31549 (Rep.Giaimo); *id.* at H31555 (Rep.Eckhardt); *id.* at H31556 (Rep.Mikva); *id.* at H31560 (Rep.Lloyd); *id.* at H31565 (Rep.Edwards); *id.* at H31568 (Rep.Wyatt); *id.* at H31571-72 (Rep.Matsunaga); *id.* at H31573 (Rep.Johnson); *id.* at H31757 (Rep.Wright); *id.* at H31760 (Rep.Holifield); *id.* at H31770-71(Rep.Hansen); *id.* at H31772-73 (Rep.Anderson); *id.* at H31779 (Reps. Drinan and Pepper). Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions.

Finally, a statement by Representative Eckhardt demonstrates that Congress intended to require its express authorization before the President could detain citizens. He said: "You have got to have an act of Congress to detain, and the act of Congress *must authorize detention.*" *Id.* at H31555 (emphasis added). Based primarily on the plain language of the Non-Detention Act but also on its legislative history and the Supreme Court's interpretation, we conclude that the Act applies to all detentions and that precise and specific language authorizing the detention of American citizens is required to override its prohibition.

Despite its plain language, the government argues that section 4001(a) is intended to preclude only detentions by the Attorney General, not by the military. Its first argument is a constitutional one: to construe section 4001(a) to include military detentions would, in the government's view, risk construing it as an unconstitutional abridgement of the President's war powers. Its second argument is a statutory "placement" argument, which the government claims is supported in two ways. First, it contends that because section 4001(a) appears in a section governing the management of prisons, it does not constrain the President's war power. Second, it maintains that because section 4001(a) immediately precedes section 4001(b)(1), which vests authority to manage prisons in the Attorney General but specifically excludes military prisons from his purview, section 4001(a) must be read to exclude military detentions.

The District Court correctly declined to construe section 4001(a) to apply only to civilian detentions in order to avoid a construction of the statute that would unconstitutionally limit the President's war power. It held that the "doctrine of constitutional avoidance 'has no application in the absence of statutory ambiguity.' " *Padilla I*, 233 F.Supp.2d at 597 (quoting *HUD v. Rucker*, 535 U.S. 125, 134, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002)). We agree. For the reasons discussed above, we have found that the statute is unambiguous. Moreover, this interpretation poses no risk of unconstitutionally abridging the President's war powers because, as we have also discussed above, the President, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States, away from a zone of combat, as enemy combatants. [FN29]

***21** Nor are we persuaded by the government's statutory placement argument. No accepted canon of statutory interpretation permits "placement" to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history. While we, of course, as the government argues, read statutes as a whole to determine the most likely meaning of particular provisions or terms, this principle has no application here. *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 105 (2d Cir.1999). Section 4001(b)(1) was enacted many decades prior to the Emergency Detention Act as part of entirely different legislation. The government points to nothing suggesting the two subsections share a common origin or meaning, rather than simply a common code designation. In any event, reliance on subsection (b)(1) suggests a conclusion opposite to the one the government proposes. Subsection (b)(1) provides:

> The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

18 U.S.C. § 4001(b)(1). In subsection (b)(1), Congress explicitly distinguished between military and civilian jurisdiction by authorizing the Attorney General to control all prisons except military institutions. The lack of any such distinction in subsection (a) suggests that none exists and that the Non-Detention Act applies to both civilian and military detentions.

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b. Specific Statutory Authorization

[15] Since we conclude that the Non-Detention Act applies to military detentions such as Padilla's, we would need to find specific statutory authorization in order to uphold the detention. The government claims that both the Joint Resolution, which authorized the use of force against the perpetrators of the September 11 terrorist attacks, and 10 U.S.C. § 956(5), passed in 1984, which provides funding for military detentions, authorize the detention of enemy combatants. It is with respect to the Joint Resolution that we disagree with the District Court, which held that it must be read to confer authority for Padilla's detention. It found that the "language [of the Joint Resolution] authorizes action against not only those connected to the subject organizations who are directly responsible for the September 11 attacks, but also against those who would engage in 'future acts of international Terrorism' as part of 'such ... organizations.' " *Padilla I*, 233 F.Supp.2d at 598-99.

We disagree with the assumption that the authority to use military force against these organizations includes the authority to detain American citizens seized on American soil and not actively engaged in combat. First, we note that the Joint Resolution contains no language authorizing detention. It provides: [FN30]

> ***22** That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution § 2(a).

Because the government seeks to read into the Joint Resolution authority to detain American citizens on American soil, we interpret its language in light of the principles enunciated in *Ex parte Endo*, 323 U.S. at 298-300. The *Endo* Court first recognized that "the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully." *Id.* at 298-99. It then said: "At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals." *Id.* at 299. Therefore, the Court held: "[i]n interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war." *Id.* at 300. The Court added: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was *clearly* and *unmistakably* indicated by the language they used." *Id.* (emphasis added).

The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) and the "clear," "unmistakable" language required by *Endo*. While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not "arrayed against our troops" in the field of battle. *Hamdi III*, 316 F.3d at 467. [FN31]

Further, the Joint Resolution expressly provides that it is "intended to constitute specific statutory authorization within the meaning of ... the War Powers Resolution." Joint Resolution § 2(b); 50 U.S.C. § 1541 *et seq.* The War Powers Resolution requires the President to cease military operations within 60 days unless Congress has declared war or specifically authorized the use of the armed forces. 50 U.S.C. § 1544(b). It is unlikely--indeed, inconceivable--that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but, at the same time, leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act.

***23** [16] Next, the Secretary argues that Padilla's detention is authorized by 10 U.S.C. § 956(5), which allows the use of appropriated funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of [the Armed Services] pursuant to Presidential proclamation." 10 U.S.C. § 956(5). The Fourth Circuit found that section 956(5) along with the Joint Resolution sufficed to authorize Hamdi's detention. *Hamdi III*, 316 F.3d at 467-68. With respect to Section 956(5), the court said: "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Id.*

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At least with respect to American citizens seized off the battlefield, we disagree. Section 965(5) authorizes nothing beyond the expenditure of money. *Endo* unquestionably teaches that an authorization of funds devoid of language "clearly" and "unmistakably" authorizing the detention of American citizens seized here is insufficient. *See* 323 U.S. at 303 n. 24 (acknowledging that Congress may ratify past actions of the Executive through appropriations acts but refusing to find in the appropriations acts at issue an intent to allow the Executive to detain a citizen indefinitely because the appropriation did not "allocate funds "earmarked" for that type of detention). In light of *Endo*, the Non-Detention Act's requirement that Congress specifically authorize detentions of American citizens, and the guarantees of the Fourth and Fifth Amendments to the Constitution, we decline to impose on section 956(5) loads it cannot bear.

CONCLUSION

In sum, we hold that (1) Donna Newman, Esq., may pursue habeas relief on behalf of Jose Padilla; (2) Secretary of Defense Rumsfeld is a proper respondent to the habeas petition and the District Court had personal jurisdiction over him; (3) in the domestic context, the President's inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat; (4) the Non-Detention Act prohibits the detention of American citizens without express congressional authorization; and (5) neither the Joint Resolution nor 10 U.S.C. § 956(5) constitutes such authorization under section 4001(a). These conclusions are compelled by the constitutional and statutory provisions we have discussed above. The offenses Padilla is alleged to have committed are heinous crimes severely punishable under the criminal laws. Further, under those laws the Executive has the power to protect national security and the classified information upon which it depends. *See, e.g.*, 18 U.S.C. app. § 3. And if the President believes this authority to be insufficient, he can ask Congress--which has shown its responsiveness--to authorize additional powers. To reiterate, we remand to the District Court with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military custody within 30 days. The government can transfer Padilla to appropriate civilian authorities who can bring criminal charges against him. Also, if appropriate, Padilla can be held as a material witness in connection with grand jury proceedings. In any case, Padilla will be entitled to the constitutional protections extended to other citizens.

APPENDIX A
TO THE SECRETARY OF DEFENSE:

*24 Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

APPENDIX B
Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

*25 This joint resolution may be cited as the "Authorization for Use of Military Force."

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.--

(1) SPECIFIC STATUTORY AUTHORIZATION.--Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.--Nothing in this resolution supercedes any requirement of the War Powers Resolution.

WESLEY, Circuit Judge, concurring in part, dissenting in part.

I respectfully dissent from that aspect of the majority's opinion that concludes the President is without authority from Congress or the Constitution to order the detention and interrogation of Mr. Padilla. [FN1] In my view, the President as Commander in Chief has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens. But even if Mr. Padilla's status as a United States citizen on United States soil somehow changes the constitutional calculus, I cannot see how the Non-Detention Act precludes an affirmance.

Because I would affirm the thoughtful and thorough decision of Chief Judge Mukasey, a brief examination of his opinion is appropriate. After examining the President's inherent powers under the Constitution, as explained in *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) ("*The Prize Cases* "), and subsequent case law, the district court held Padilla's detention is not unlawful, as the President is authorized under the Constitution to repel belligerent acts that threaten the safety of United States citizens. The court also held that the detention is authorized by Congress' Authorization for Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"). Chief Judge Mukasey noted that 18 U.S.C. § 4001(a) did not preclude this result in that the Joint Resolution identified a specific group of belligerents.

Relying on the Third Geneva Convention, the district court examined the distinction between lawful and unlawful combatants and ultimately concluded that either could be detained. *See Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564, 594-95 (S.D.N.Y.2002). The court concluded that the President's ability to detain Padilla as an unlawful enemy combatant was not altered by Padilla's citizenship. *See id.* at 594 (citing *Ex Parte Quirin*, 317 U.S. 1 (1942)). The court distinguished *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), by noting that the citizens in *Milligan* were neither part of, nor associated with, the armed forces of the Confederacy. *See id.* Thus, they were not enemy combatants subject to the laws of war.

*26 Much of Chief Judge Mukasey's work is not the focus of the majority's analytical resolution of this case. I offer that not as a criticism but merely as a note of limitation. Our task here is confined to the interplay between the President's Article II responsibilities as Commander in Chief and the authority of Congress to regulate domestic activity, even in a time of war, pursuant to Article I of the Constitution.

My disagreement with the majority is two-fold. In my view, the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the Joint Resolution specifically and directly authorized the President to take the actions herein contested. The majority concludes the President is without inherent authority to detain Padilla. They agree that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," Maj. at 27 (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988)), and concede the judiciary has no authority to determine the political question of whether the nation is at war. *Id.* They recognize that the President and Congress often work cooperatively during times of armed

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conflict. However, the majority contends that separation of powers concerns are heightened when the President's powers are exercised in the "domestic sphere" and that Congress, not the Executive, controls utilization of war powers when invoked as an instrument of domestic policy. Maj. at 28.

It is true that Congress plays the primary role in domestic policy even in a time of war. Congress does have the power to define and punish offenses committed on U.S. soil, *see* U.S. CONST. art. I, § 8, cl. 10, to suspend the Writ of Habeas Corpus, *see* U.S. CONST. art. I, § 9, cl. 2, and to determine when and if soldiers are to be quartered in private homes during a time of war, *see* U.S. CONST. amend. III. But none of those powers are in question here nor does the majority cite a specific constitutional provision in which Congress is given exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil. There is no well traveled road delineating the respective constitutional powers and limitations in this regard.

The majority relies on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), as its analytical guide in determining the President's constitutional authority in this matter. However, this is a different case. In *Youngstown*, the Supreme Court was confronted with two opposing claims of constitutional authority. The President argued he had the authority to seize the steel mills in question by virtue of his constitutional responsibilities as Commander in Chief and as Chief Executive. *Id.* at 582. The President contended that a steady supply of steel was necessary to sustain the war effort in Korea. *See id.* at 582-83. The steel mills argued that at its core the dispute was a labor matter--an area clearly reserved for congressional regulation. *See id.* at 582. The Court sided with the steel mills, *id.* at 589, and with good reason--the President's attempt to link the seizure to prosecuting the war in Korea was far too attenuated. In this case the President's authority is directly tied to his responsibilities as Commander in Chief.

***27** In *The Prize Cases* the Supreme Court rejected a challenge to the President's authority to impose a blockade on the secessionist states absent a declaration of war. *See* 67 U.S. at 668. As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary. *See id.* at 669-70. The President has "no power to initiate or declare a war" but "[i]f a war be made by invasion .... the President is not only authorized but bound to resist force by force. He ... is bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668. Regardless the title given the force, the President, in fulfilling his duties as Commander in Chief to suppress insurrection and to deal with belligerents aligned against the nation, is entitled to determine the appropriate response. *See id.* at 669-70.

In reaching this conclusion the Court noted the President's decision regarding the level of force necessary is a political not a judicial decision. *Id.* at 670. Thus, as courts have previously recognized, *The Prize Cases* stands "for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C.Cir.2000) (Silberman, *J.*, concurring); *see also Padilla*, 233 F.Supp.2d at 589. "[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and ... his decision is conclusive upon all other persons." *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827). [FN2] *The Prize Cases* demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.

My colleagues appear to agree with this premise but conclude that somehow the President has *no* power to deal with acts of a belligerent on U.S. soil "away from a zone of combat" absent express authorization from Congress. Maj. at 4, 26, 43. That would seem to imply that the President does have some war power authority to detain a citizen on U.S. soil if the "zone of combat" was the United States. The majority does not tell us who has the authority to define a "zone of combat" or to designate a geopolitical area as such. Given the majority's view that "the Constitution lodges ... [inherent national emergency powers] with Congress, not the President," Maj. at 31, it would seem that the majority views this responsibility as also the singular province of Congress. That produces a startling conclusion. The President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention. Curiously, even Mr. Padilla's attorney conceded that the President could detain a terrorist without Congressional authorization if the attack were imminent. *See* Oral Argument Tr. at 51.

***28** But the scope of the President's inherent war powers under Article II does not end the matter, for in my view Congress clearly and specifically authorized the President's actions here. [FN3] As Chief Judge Mukasey noted, the Joint Resolution, passed by both houses of Congress, "authorizes the President to use necessary and appropriate force in order, among other things, 'to prevent any future acts of international terrorism against the United States,' and thereby engages the President's full powers as Commander in Chief." *Padilla*, 233 F.Supp.2d at 590 (quoting Pub.L. No. 107-40, 115 Stat. 224); *cf. Quirin*, 317 U.S. at 29 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power ... [f]or here Congress has authorized [his actions]"). *Youngstown* fully supports that view. "When the President acts pursuant to an *express* or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635 (Jackson, *J.*, concurring) (emphasis added). The Joint Resolution authorized the President to take the action herein challenged; his powers were at their apogee.

Following the attacks of 9-11, the President declared a national emergency. *See* 50 U.S.C. § 1541(c)(3) (2003). On September 18, 2001, Congress passed Public Law 107-40 as a joint resolution. Pub.L. No. 107-40, 115 Stat. 224. That resolution, entitled "Authorization for Use of Military Force," notes the "acts of treacherous violence committed against the United States and its citizens," and the danger those acts posed to national security. *Id.* Moreover, the resolution recognizes "the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States." *Id.* (emphasis added). It provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub.L. No. 107-40, § 2(a), 115 Stat. 224, 224. [FN4] Some of the belligerents covered by the Joint Resolution are not nation states, they have no armies in the traditional sense--their "membership" consists of "soldiers" who rely on subterfuge and surprise. Congress recognized that these organizations are waging a war different from any our nation has faced. It authorized the President to employ the necessary and appropriate force to prevent future terrorist attacks.

It is quite clear from the President's Order of June 9, 2002 that Mr. Padilla falls within the Joint Resolution's intended sweep. Appendix A at 50-51. As relevant here, the Joint Resolution authorizes the President (1) to use appropriate and necessary force--detention would seem to be an appropriate level of force in Mr. Padilla's situation, (2) against those organizations that planned, authorized, or committed the terrorist attacks of 9-11--none of us disputes al Qaeda is responsible for the carnage of that day, (3) in order to prevent future attacks of terrorism against the United States--Padilla is alleged to be closely associated with an al Qaeda plan to carry out an attack in the United States [FN5] *and* to possess information that if obtained by the U.S. would prevent future terrorist attacks.

***29** The Joint Resolution has limits; it applies only to those subsets of persons, organizations and nations "[the President] determines planned, authorized, committed, or aided the terrorist attacks." Pub.L. No. 107-40, 115 Stat. 224. The President is not free to detain U.S. citizens who are merely sympathetic to al Qaeda. [FN6] Nor is he broadly empowered to detain citizens based on their ethnic heritage. Rather, the Joint Resolution is a specific and direct mandate from Congress to stop al Qaeda from killing or harming Americans here or abroad. [FN7] The Joint Resolution is quite clear in its mandate. Congress noted that the 9-11 attacks made it "both necessary and appropriate that the United States exercise its rights to self-defense and to protect Unites States citizens both at home and abroad." *Id.* It seems clear to me that Congress understood that in light of the 9-11 attacks the United States had become a zone of combat.

Organizations such as al Qaeda are comprised of people. Congress could not have intended to limit the President's authority to only those al Qaeda operatives who actually planned or took part in 9-11. That would do little to prevent future attacks. The fate of the participants is well known. And surely Congress did not intend to limit the President to pursue only those individuals who were al Qaeda operatives as of September 11, 2001. But even if it did, Mr. Padilla fits within the class for by September of 2001, he had already been under the tutelage and direction of senior al Qaeda officers for three years. Clearly, Congress recognized that al Qaeda and those who now do its bidding are a continuing threat to the United States. Thus, the Joint Resolution does have teeth and whether Padilla is a loaded weapon of al Qaeda would appear to be a fact question. A hearing, as ordered by the district court, would have settled the matter.

The majority suggests, however, that the President's actions are ultra vires because "the Joint Resolution does not specifically authorize detentions." Maj. at 38, 44-47. To read the resolution as the majority suggests would create a false distinction between the use of force and the ability to detain. It would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.

The majority contends that 18 U.S.C. § 4001(a) prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. They offer a detailed history of the statute's enactment, which effectuated a repeal of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811-26 (1970).

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I share their view that the plain language of the statute appears to apply to military and civil detentions and that its placement in the U.S.Code does not rebut that conclusion. *See* Maj. at 42-44. [FN8] However, I find it somewhat puzzling that despite the statute's obvious and conceded clarity, the majority, based solely on the statement of one Member of Congress, *see* Maj. at 41, sees fit to add a condition not found in the words of the section. The statute is quite clear: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The section neither defines an "Act of Congress" nor contains a requirement that the authorizing enactment use the word "detention." The majority does not contest that the Joint Resolution is an Act of Congress. However, they chafe at its lack of specificity. As noted above, I think it would be quite difficult to conclude that Congress did not envision that detaining a terrorist was a possibility. It is apparent from the legislative record of § 4001(a) and the Joint Resolution that the efforts of Congress in each instance meant and implied many different things to individual Members. That is not unusual. It would be quite a surprise to see that Congress was of one mind on any issue; that is the nature of a representative democracy. But one thing is clear, both enactments have the force of law. It is the words used, not the individual motives of legislators, that should serve as the guide. Thus, I think it best to trace a course of legislative intent using the plain and powerful language employed.

***30** The problem with the majority's view of the Joint Resolution of September 18, 2001 is that it reduces the legislative efforts contained therein to a general policy statement notwithstanding the resolution's declaration invoking the War Powers Resolution of 1973. Following the events of 9-11 the President declared a national emergency, 66 Fed.Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's utilization of his war powers. [FN9] Congress passed the Joint Resolution and agreed that the President should utilize his war powers with regard to an identified threat. Of course, identifying the threat made sense. Only days earlier the nation had been attacked--American lives had been lost on American soil. Congress responded and invested the President with authority to pursue those responsible for the attacks in order to prevent future attacks. [FN10] Contrary to the implication of the majority, the Joint Resolution was *not* limited in geographic scope. It did not limit the President's authority to foreign theaters. Congress clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil.

The President's authority to detain an enemy combatant in wartime is undiminished by the individual's U.S. citizenship. *Quirin*, 317 U.S. at 37- 38; *see also Rumsfeld v. Hamdi*, 296 F.3d 278, 281-83 (4th Cir.2002). Consequently, Padilla's citizenship here is irrelevant. Moreover, the fact that he was captured on U.S. soil is a distinction without a difference. While Mr. Padilla's conduct may have been criminal, it was well within the threat identified in the Joint Resolution. The resolution recognizes the painful reality of 9-11; it seeks to protect U.S. citizens from terrorist attacks at home and abroad. "[E]ntry upon our territory in time of war by enemy belligerents, including those acting under the direction of armed forces of the enemy ... is a warlike act." *Quirin*, 317 U.S. at 36-37. [FN11]

Congress presumably was aware of § 4001(a) when it passed the Joint Resolution. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988). The resolution was congressional confirmation that the nation was in crisis. Congress called upon the President to utilize his Article II war powers to deal with the emergency. By authorizing the President to use necessary and appropriate force against al Qaeda and its operatives, Congress had to know the President might detain someone who fell within the categories of identified belligerents in carrying out his charge. A different view requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution. And if, as the majority asserts, § 4001(a) is an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional.

***31** Sadly, the majority's resolution of this matter fails to address the real weakness of the government's appeal. Padilla presses to have his day in court to rebut the government's factual assertions that he falls within the authority of the Joint Resolution. The government contends that Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof by an appropriate standard. The government fears that to do otherwise would compromise its ability both to gather important information from Mr. Padilla and to prevent him from communicating with other al Qaeda operatives in the United States.

While those concerns may be valid, they cannot withstand the force of another clause of the Constitution on which all three of us could surely agree. No one has suspended the Great Writ. *See* U.S. CONST. art. I, § 9, cl. 2. Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone. I therefore would extend to him the right to counsel as Chief Judge Mukasey did. *See Padilla*, 233 F.Supp.2d at 599-609. At the hearing, Padilla, assisted by counsel, would be able to contest whether he is actually an enemy combatant thereby falling within the President's constitutional and statutory authority.

One of the more troubling aspects of Mr. Padilla's detention is that it is undefined by statute or Presidential Order. *Compare Quirin*, 317 U.S. at 26- 28, 35 (citing former 10 U.S.C. §§ 1553 and 1554 (1940)), *with* 66 Fed.Reg. 57833 (2001). Certainly, a court could inquire whether Padilla continues to possess information that was helpful to the President in prosecuting the war against al Qaeda. Presumably, if he does not, the President would be required to charge Padilla criminally or delineate the appropriate process by which Padilla would remain under the President's control. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

Mr. Padilla's case reveals the unique dynamics of our constitutional government. Padilla is alleged to be a member of an organization that most Americans view with anger and distrust. Yet his legal claims receive careful and thoughtful attention and are examined not in the light of his cause--whatever it may be--but by the constitutional and statutory validity of the powers invoked against him. *See Youngstown*, 343 U.S. at 623 (Jackson, J., concurring).

FN1. Therefore, our holding effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof.

FN2. These details should not be read to suggest that Padilla is in fact innocent or that the government lacked substantial reasons to be suspicious of him. We include them because they are relevant to our analysis of the President's power to detain Padilla as an enemy combatant. As is evident from the government investigation, described below, the government had ample cause to suspect Padilla of involvement in a terrorist plot. We, of course, reach no conclusion as to Padilla's guilt or innocence.

FN3. The full text of the President's Order is set forth in Appendix A.

FN4. Prior to oral argument, we reviewed the sealed Mobbs declaration as well as a sealed declaration of Vice Admiral Lowell E. Jacoby, the Director of the Defense Intelligence Agency, which was submitted to the District Court in connection with Secretary Rumsfeld's motion for reconsideration. Nothing in the ensuing discussion or holdings relies on either of these sealed documents.

FN5. Twelve amici submitted briefs in support of Petitioner and one in support of Respondent. Almost all of these briefs have been helpful to us. We particularly appreciate the amici's care in emphasizing different issues and thus eliminating much of the redundancy that would otherwise exist. At oral argument on November 17, 2003, we requested post-argument submissions concerning the legislative history of the congressional acts urged to be dispositive of this case. These submissions were received by the Clerk's office on November 28, 2003, and by chambers on December 2, 2003.

FN6. The District Court characterized its finding that Newman could act as next friend as "a ruling that I cannot imagine will be open to serious question." *Padilla III*, 256 F.Supp.2d at 221. While the Order certifying this matter for interlocutory appeal did not certify the next friend issue, this Court "may address any issue fairly included within the certified order" because "it is the order that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks and citation omitted).

FN7. Whether a person seeking next friend status must have a "significant relationship" to the petitioner has not been resolved by this Court or by the Supreme Court. The Supreme Court merely said that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64. In the ensuing discussion, we assume--without holding--that there is a significant relationship requirement for next friend status.

FN8. The facts of this case distinguish it from *Hamdi v. Rumsfeld*, 294 F.3d 598 (2002) ("*Hamdi I*"), and *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir.2002), *cert. denied*, --- U.S. ----, 123 S.Ct. 2073, 155 L.Ed.2d 1060 (2003), on which the government relies. In both of those cases, the putative next friends had *no* relationship with the petitioner. *Hamdi I*, 294 F.3d at 606-607; *Coalition of Clergy*, 310 F.3d at 1162.

FN9. Other courts have rejected this argument. In *Eisel v. Sec'y of the Army*, 477 F.2d 1251 (D.C.Cir.1973), a case involving an inactive reservist, the court stated:
[W]hile the statute does provide that the action

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shall be against the "person having custody of the person detained," it does not define "custody" or specify who the person having "custody" will be. Nowhere does the statute speak of an "immediate custodian" or intimate that an action must necessarily be instituted in the location of such an "immediate custodian," even if it were possible to grant substance to the vague concept of "immediate custodianship."
Id. at 1258 (footnotes omitted).

FN10. The only exceptions involve limited circumstances where prisoners are held abroad with no domestic forum available or where the prisoner is being held at an undisclosed location. *See Demjanjuk v. Meese*, 784 F.2d 1114, 1115-16 (D.C.Cir.1986).

FN11. Four years later in *Ahrens v. Clark*, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), the Supreme Court was again confronted with the issue. *Ahrens* involved habeas petitions brought by German immigrants detained on Ellis Island under removal orders issued by the Attorney General. The petitions named the Attorney General as sole respondent. The *Ahrens* Court determined the petitions had to be dismissed because the detainees had not filed petitions in the district court for the district in which they were confined. *Id.* at 193. In so holding, *Ahrens* left open the question of whether the Attorney General, under whose removal orders and "custody and control" the aliens were detained, could be a proper respondent to the petitions. *Id.* at 189, 193.

FN12. In between *Endo* and *Strait*, the Court also decided *Schlanger v. Seaman's*, 401 U.S. 487, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971), which addressed a habeas petition filed by a United States soldier temporarily studying at Arizona State University but under the control of military officers at Moody Air Force Base ("Moody AFB") in Georgia. Schlanger filed a petition in Arizona district court alleging his enlistment contract had been breached and his freedom was being unlawfully restricted by the military. The petition named the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of ROTC on Arizona State University's campus as respondents. In reaching its conclusion that the Commander of Moody AFB was Schlanger's custodian and outside the reach of the territorial jurisdiction of the Arizona district court, the Court did not discuss whether the Secretary of the Air Force might be both within the court's jurisdiction and a proper respondent. In our opinion, by this omission and the Court's emphasis on the Commander at Moody as an essential party, *Schlanger* suggested that the proper respondent is the person who exercises the power to limit petitioner's liberty.

FN13. A number of courts have embraced this approach. For example, in *Armentero v. INS*, 340 F.3d 1058 (9th Cir.2003), the Ninth Circuit held that the Attorney General was the proper respondent to an immigration habeas petition, citing the necessity to base the concept of "custodian" for the purpose of habeas relief "more on the legal reality of control than the technicalities of who administers [to petitioner] on a day-to-day basis." *Id.* at 1070. Although we acknowledge the circuit split regarding the propriety of designating the Attorney General as the habeas respondent to an immigrant's petition, *e.g.*, *Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir.2000) (holding that the Attorney General was not a proper respondent), as well as our own Court's reluctance to reach the question, *see Henderson v. INS*, 157 F.3d 106, 128 (2d Cir.1998), *cert. denied*, 526 U.S. 1004 (1999), we are satisfied that the unique involvement of Secretary Rumsfeld distinguishes this case from the typical immigrant petition.

FN14. *Braden* overruled, in part, the Court's earlier decision in *Ahrens* that a habeas petition could only be filed in a court sitting within the district in which the petitioner is confined. *See supra* note 11; *see also infra* Section I.B.ii.

FN15. In addition to the cases we already have cited, prisoners in other Supreme Court cases have named someone other than their immediate custodian as the respondent. *See Garlotte v. Fordice*, 515 U.S. 39, 42, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995) (respondent named by an incarcerated prisoner was the governor of the state and not the prison warden); *Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955) (Secretary of the Air Force named as respondent by ex-service member in military custody in Korea); *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953) (Secretary of Defense named as respondent by service member held in military custody in Guam). Although these cases do not analyze the propriety of naming a high level official rather than an immediate physical custodian as the respondent, they certainly suggest that there is no inflexible rule that the immediate custodian is the only proper respondent.

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FN16. While *Braden* is clearly about the jurisdiction of the court, its resolution rests in part on determining the proper custodian/respondent. Recognizing the overlap and interrelationship of these issues, it is important to note we must first determine if Secretary Rumsfeld is a proper respondent. The jurisdictional analysis logically follows thereafter.

FN17. Moreover, circumstances we foresaw in *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir.1978), indicate Secretary Rumsfeld is an appropriate respondent in this case. *Billiteri* held that the Board of Parole is not an appropriate respondent in habeas petitions involving prisoners seeking early parole. *Id.* at 948. Nevertheless, *Billiteri* also noted the possibility that "when *the Board itself* has caused a parolee to be detained for violation of his parole," the parole board may qualify as a custodian for habeas purposes. *Id.* (emphasis added). Here, Secretary Rumsfeld by his own actions and decisions caused Padilla to be detained.

FN18. Secretary Rumsfeld argues only that long-arm jurisdiction is inapplicable in the habeas context. He does not argue that section 302(a)(1) does not reach his activities in this state. We choose to address this issue because neither the courts of this circuit nor the New York courts have had an opportunity to examine the application of section 302(a)(1) in this unusual context.

FN19. The term "transacts any business" has been held to include: engaging in active bidding on an open phone line from California, *Parke-Bernet*, 26 N.Y.2d at 19, 308 N.Y.S.2d 337, 256 N.E.2d 506; the conducting of proceedings and disciplinary hearings on membership by a private organization, *Garofano v. U.S. Trotting Assoc.*, 335 N.Y.S.2d 702, 705-06 (N.Y.Sup.Ct.1974); the execution of a separation agreement, *Kochenthal v. Kochenthal*, 28 A.D.2d 117, 282 N.Y.S.2d 36, 38 (N.Y.App.Div.1967); the making of a retainer for legal services, *Elman v. Benson*, 32 A.D.2d 422, 302 N.Y.S.2d 961, 964-65 (N.Y.App.Div.1969); the entry into New York by non-domiciliary defendants to attend a meeting, *Parker v. Rogerson*, 33 A.D.2d 284, 307 N.Y.S.2d 986, 994-95 (N.Y.App.Div.1970), *appeal dismissed*, 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and the conducting of audits, *U.S. Steel Corp. v. Multistate Tax Comm'n*, 367 F.Supp. 107, 121 (S.D.N.Y.1973).

FN20. Although not relevant to the resolution of this case, it is important to note that in setting forth certain bases of permitted activity for long-arm jurisdiction, section 302 does not reach the outposts of constitutionally permitted activity. *See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 67, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984). Thus, a situation could occur in which the necessary contacts to satisfy due process are present, but *in personam* jurisdiction is not obtained in New York because the statute does not authorize it. *See* Seigel, N.Y. Prac., § 85, at 137 (3d. ed.1999).

FN21. Although the complained of action in this case is not the signing of the June 9 Order, it is nonetheless relevant given its charge to Secretary Rumsfeld.

FN22. Similarly, we believe personal jurisdiction of Secretary Rumsfeld comports with due process. *See Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). We believe that requiring Secretary Rumsfeld to litigate this matter in the Southern District of New York imposes no significant burden upon him--and, indeed, is most convenient for the parties--especially given the fact that this case has, for the last 18 months, been actively litigated in this district.

FN23. The full text of the Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

FN24. The dissent misreads us to suggest that the President has no power to deal with imminent acts of belligerency on U.S. soil outside a zone of combat and absent express authorization from Congress. *See infra at* [57-58]. We make no such claim. As we have discussed, criminal mechanisms exist for dealing with such situations. We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat.

FN25. The dissent argues that *Quirin* located the President's authority to try the saboteurs before a military tribunal, in part, on his powers as Commander-in-Chief. 317 U.S. at 28. However, the Court clearly viewed the statutory basis as the primary ground for the imposition of military jurisdiction, and regarded any inherent executive

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authority, if indeed it existed, as secondary: "By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also *such* authority as the Constitution itself gives the Commander in Chief ...." *Id.* The Court certainly did not find the President's Commander-in-Chief powers independently sufficient to authorize such military commissions. In fact, as noted above, the Court explicitly declined to reach this question.

FN26. The government relies heavily on the factual parallels between the *Quirin* saboteurs and Padilla. Similar to the *Quirin* saboteurs, Padilla allegedly traveled overseas to Afghanistan and Pakistan, where he engaged in extended discussions with senior al Qaeda operatives about conducting hostile operations within the United States. Padilla is also alleged to have received explosives training and to have returned to the United States to advance prospective al Qaeda attacks against this country. We are not persuaded by these factual parallels that the President can act to place citizens in military detention absent congressional authorization because the *Quirin* Court relied on such authorization to justify the detention and military trial of the *Quirin* saboteurs, an authorization that we believe is lacking here.

FN27. The dissent expresses deep concerns that our holding means that the President lacks inherent authority to detain a terrorist in the face of imminent attack. The President's authority to detain such a person is not an issue raised by this case. The dissent's concerns overlook the fact that Padilla was detained by the military while a maximum security inmate at the MCC. Thus, issues concerning imminent danger simply do not arise in this case.

FN28. Railsback and Ichord's shared view of the scope of the Non- Detention Act was echoed by another opponent of the bill. *See, e.g., id.* at 31554 (Representative Williams stating that "I do not want to see the President's hands tied by the language of the [Railsback] proposal which would require an Act of Congress before any likely subversive or would-be saboteur could be detained"). However, another opponent of the bill and member of the Internal Security Committee argued that even with the Railsback amendment, the President could declare a national emergency and act to detain citizens using his inherent powers. *See id.* at 31547 (remarks of Representative Ashbrook). We address the President's inherent powers *supra* at Section II.B.ii.

FN29. If the President's Commander-in-Chief powers were plenary in the context of a domestic seizure of an American citizen, the government's argument that the legislature could not constitutionally prohibit the President from detaining citizens would have some force. *Cf. Hamdi III*, 316 F.3d at 468 (stating that " § 4001(a) functioned principally to repeal the Emergency Detention Act [which] had provided for the preventive 'apprehension and detention' of individuals *inside* the United States 'deemed likely to engage in espionage or sabotage' during 'internal security emergencies" ' and that "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen *captured on the battlefield* during wartime may be treated like the enemy combatant that he is" (quoting H.R.Rep. No. 92- 116, at 2 (1971)) (emphases added)). In view of the plain language of the Act, it might have been preferable to hold that Congress could not intrude on the President's Commander-in-Chief power on the battlefield rather than to interpret the Act as the Fourth Circuit did. We do not have to reach that issue, however. As we have previously noted, Judge Wilkinson, one of the authors of *Hamdi III*, remarked in his later concurrence to the decision not to rehear *Hamdi III* en banc that "[t]o compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi IV*, 337 F.3d at 344.

FN30. The full text of the resolution is set forth in Appendix A.

FN31. The debates on the Joint Resolution are at best equivocal as to the President's powers and never mention the issue of detention. Therefore, even assuming they could overcome the lack of a specific grant to the President, they do not suggest that Congress authorized the detention of United States citizens captured on United -States soil. Some legislators believed the President's authority was strictly limited. *See, e.g.*, 147 Cong. Rec. H5639 (Rep. Lantos: "to bring to bear the full force of American power abroad"). Supporters of the President's power argued that it was too limited. *See, e.g., id.* at H5653 (Rep. Barr arguing that in addition to the joint resolution, Congress should declare war to "[g]ive the President the tools, the absolute flexibility he needs under international law and The Hague Convention to ferret these people out wherever they are, however he finds them, and get it done as quickly as possible"); *id.* at H5654 (Rep. Smith: "This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday. This is a significant restraint on the President's ability to root out terrorism wherever it may be found.")

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FN1. I concur in the majority's analysis that Newman can serve as Padilla's next friend, that Secretary Rumsfeld is an appropriate respondent and that the district court had personal jurisdiction over the Secretary.

FN2. *Quirin* spoke to the issue of Presidential authority as well. In that case, the Court found the President's decision to try the saboteurs before a military tribunal rested in part on an exercise of his Presidential authority under Article II of the Constitution. *See Quirin*, 317 U.S. at 28.

FN3. Of course, the majority must delineate the President's war powers as Commander in Chief; if the President acted within his inherent authority, the scope of the Joint Resolution and the proscription of § 4001(a) is irrelevant.

FN4. The Joint Resolution also provides, in section 2(b)(1), that it is "intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Pub.L. No. 107-40 § 2(b)(1), 115 Stat. 224, 224. As noted by Chief Judge Mukasey, 233 F.Supp.2d at 571 n. 3, the War Powers Resolution was enacted in 1973 over Presidential veto, and purported to limit the President's authority and discretion to commit American troops to actual or potential hostilities without specific congressional authorization. Pub.L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541 et seq.). Although President Bush signed the Joint Resolution the day it was passed, he did so noting "the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the Constitutionality of the War Powers Resolution." Press Release, Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (statement by the President), *available at* http://www.whitehouse.gov/news/releases/2001/09 20010918-10.html.

FN5. The majority confirms that "the government had ample cause to suspect Padilla of involvement in a terrorist plot." Maj. at 6 n.2.

FN6. Compare the language of the Joint Resolution, *supra* at 6-7, with that of the Emergency Detention Act of 1950, former 50 U.S.C. §§ 811- 26 (1970), which authorized the President to detain:
persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage ..., in a time of internal security emergency, essential to the common defense and to the safety and security of the territory, the people and the Constitution of the United States.
Id. at § 811(14).

FN7. In fact, some in Congress were concerned the "organization" prong of the Joint Resolution was too limited in its scope. They felt the Joint Resolution, as enacted, unnecessarily limited the President's ability to act against terrorist organizations such as Hamas, Hezbollah and Islamic Jihad. *See, e.g.*, 147 Cong. Rec. H5638, 5643 (2001) (statement of Representative Berman).

FN8. I also concur with my colleagues' rejection of the Secretary's argument that 10 U.S.C. § 956(5) constitutes an Act of Congress authorizing detentions such as Padilla's.

FN9. Although the President may view the War Powers Resolution as an unconstitutional infringement on his constitutional authority to deal with belligerents, that fight need not be won here.

FN10. The majority concludes that Mr. Padilla's detention as a material witness "neutralized" the threat he presented. *See* Maj. at 6, 37 n.27. This of course overlooks a significant aspect of the President's Order of June 9, 2002. Padilla was not only a threat with regard to a specific terrorist plot, *see* Maj. at 6 n.2, he allegedly possesses information that could assist the United States in thwarting other terrorists plots in the U.S. and abroad.

FN11. Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3317, 75 U.N . T.S. 135, prisoners of war subject to capture include all "persons who accompany the armed forces without actually being members thereof."

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IN THE SUPREME COURT OF THE UNITED STATES

(29)

No. 03-6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, respondents respectfully file this Supplemental Brief to address the decision of the United States Court of Appeals for the Second Circuit in Padilla v. Rumsfeld, __ F.3d __, 2003 WL 22965085 (Dec. 18, 2003), which was issued after the filing of respondents' Brief in Opposition in this case. The United States intends to file a petition for a writ of certiorari in Padilla on or by January 20, 2004, and to propose expedited consideration of the Padilla petition so that, if it is granted, the case may be argued during the April argument session of the Court this Term.

1. In Padilla, the Second Circuit held that the President of

the United States lacks authority to detain as an enemy combatant Jose Padilla, a United States citizen seized within the United States on May 8, 2002.* The President ordered Padilla's detention as an enemy combatant based on a determination that Padilla is closely associated with al Qaeda and came to the United States to advance plans for the conduct of further terrorist attacks against the United States. See 2003 WL 22965085, at *3, *24.

On December 18, 2003, the Second Circuit ruled that Padilla's detention is barred by 18 U.S.C. 4001(a). The court reasoned that Section 4001(a) prohibits the detention of American citizens detained by the military as enemy combatants, and that "precise and specific language authorizing the detention of American citizens is required to override [Section 4001(a)'s] prohibition." 2003 WL 22965085, at *20. The court determined that Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), fails to authorize Padilla's detention, reasoning that the Authorization does not "include[] the authority to detain American citizens seized on American soil and not actively engaged in combat." 2003 WL 22965085, at *21. The Court likewise found that 10 U.S.C. 956(5), which authorizes the use of appropriated

* As a threshold matter, the Second Circuit rejected the government's arguments that habeas jurisdiction is lacking in the Southern District of New York, where the habeas petition was filed. The court concluded that Secretary Rumsfeld is an appropriate respondent to the habeas petition filed on Padilla's behalf and that the district court's habeas jurisdiction extends to Secretary Rumsfeld. See 2003 WL 22965085, at *6-*10.

funds for the detention of persons "similar to prisoners of war," fails to encompass the detention of "American citizens seized off the battlefield." 2003 WL 22965085, at *23. The court held that, in the absence of statutory authorization, the President's Commander-in-Chief powers under Article II of the Constitution do not encompass the detention of a United States citizen in the circumstances of Padilla's case. Id. at *17-*18.

At the same time, the Second Circuit specifically stated that it was "not address[ing] the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)." Padilla, 2003 WL 22965085, at *1. In addition, the Second Circuit repeatedly emphasized that its decision in Padilla did not address the circumstances of Hamdi's detention and was not intended to reflect disagreement with the Fourth Circuit's decision in Hamdi. See, e.g., 2003 WL 22965085, at *11 ("our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield"); id. at *13 ("we do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield"); id. at *31 n.24 ("We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat."). In short, the Second Circuit deemed the Fourth

Circuit's decision in Hamdi to be "inapposite." Id. at *17.

The Second Circuit remanded the Padilla case to the district court with "instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military control within 30 days." 2003 WL 22965085, at *23. The court has not yet issued its mandate, however, so the 30-day-period established by the Second Circuit's decision has not yet begun to run. See Fed. R. App. P. 41.

2. The Second Circuit's decision in Padilla is fundamentally at odds with this Court's precedents, e.g., Ex parte Quirin, 317 U.S. 1 (1942), undermines the President's constitutional authority to protect the Nation from additional enemy attacks in wartime, and has resulted in an unprecedented order directing the President to release an individual whom the President, as Commander in Chief, has determined is an enemy combatant intent on committing hostile and war-like acts against the United States. See 2003 WL 22965085, at *24 (Presidential Order). Moreover, the Second Circuit's decision rests on a novel and erroneous interpretation of 18 U.S.C. 4001(a), and Congress's Authorization for Use of Military Force in the current conflict.

Because the Second Circuit's decision in Padilla incorrectly resolves issues of extraordinary public significance, the United States intends to file a petition for a writ of certiorari in the Padilla case on or by January 20, 2004. In addition, in

conjunction with the filing of the petition, the government intends to propose a schedule for expedited consideration of the case in this Court and to move the court of appeals (and, if necessary, this Court) to stay the issuance of the court of appeals' mandate. The government intends to contact petitioners' counsel in Padilla and seek to reach an agreement on a schedule for expedited consideration of the Padilla decision in this Court that would permit the case to be argued in April and decided this Term.

3. Because the Second Circuit went out of its way in its decision in Padilla to distinguish the Fourth Circuit's decision in Hamdi, the Padilla decision itself does not provide a basis for granting certiorari in Hamdi. However, in light of the government's intention to file an expedited petition for certiorari in Padilla, the Court may wish to defer consideration of the petition in Hamdi and to consider the two cases at the same Conference. In formulating its petition for certiorari in Padilla, the government will address the interrelationship between the questions presented by the government's petition in Padilla and the Fourth Circuit's decision in Hamdi.

4. In a supplemental brief filed on January 5, 2004, petitioners in Hamdi state that the Second Circuit's decision in Padilla "clearly conflicts" with the Fourth Circuit's decision in Hamdi on the applicability of 18 U.S.C. 4001(a) "to persons designated enemy combatants by the Executive." Supp. Br. 3. That

argument ignores the repeated statements by the Second Circuit concerning the nature of its ruling. Although the government believes that the Second Circuit's application of Section 4001(a) to Padilla's detention is erroneous and intends to seek review of that ruling in this Court, there is no irreconcilable conflict between the Second Circuit's decision in Padilla and the Fourth Circuit's decision in Hamdi because, as noted, the Second Circuit explicitly did not question the President's authority under Section 4001(a) -- or the Constitution -- to detain an individual, such as Hamdi, captured by the military in an active combat zone overseas.

Petitioners in Hamdi also contend that the Second Circuit's decision in Padilla is in "direct conflict" with Hamdi concerning whether Hamdi was entitled under the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) to access to counsel to challenge the Executive's determination to detain him as an enemy combatant, and assert that "all three panel members" in Padilla would agree that Padilla's military detention without access to counsel "violates the Suspension Clause." Supp. Br. 14. That, too, is incorrect.

The panel majority in Padilla explicitly declined to consider whether Padilla was entitled to access to counsel to challenge his military detention. As the Second Circuit explained at the outset of its opinion, the court's conclusion that the President lacked the authority to detain Padilla as an enemy combatant "effectively moots arguments raised by both parties concerning access to

counsel, standard of review, and burden of proof." 2003 WL 22965085, at *33 n.1. It is true that Judge Wesley discussed those issues in his separate opinion concurring in part and dissenting in part, but his statements -- which were not joined by any other panel member -- do not represent the views of the Second Circuit and thus could create no conflict between the Second Circuit and the Fourth Circuit. That is particularly true because, in concluding that Hamdi was not entitled to access to counsel, the Fourth Circuit emphasized the fact that it was undisputed by petitioners themselves in Hamdi that Hamdi was captured in Afghanistan, an active combat zone overseas.

In any event, if the Court concludes, after reviewing the government's petition in Padilla, that certiorari is nonetheless warranted in Hamdi, the schedule for expedited review in Padilla would likewise permit sufficient time for briefing and argument of the Hamdi case during the April argument session of the Court.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

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In The
Supreme Court of the United States

KHALED A. F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

SHAFIQ RASUL, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

YASIR ESAM HAMDI,

Petitioner,

v.

DONALD RUMSFELD,

Respondent.

On Petitions For Writs Of Certiorari To The United States Courts Of Appeals For The District Of Columbia Circuit And The Fourth Circuit

BRIEF OF AMICUS CURIAE FRED KOREMATSU IN SUPPORT OF PETITIONERS

GEOFFREY R. STONE
DAVID A. STRAUSS*
1111 East 60th Street
Chicago, IL 60637
(773) 702-4907

STEPHEN J. SCHULHOFER
40 Washington Sq. So.
New York, NY 10012

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF *AMICUS CURIAE*[1]

More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*,[2] this Court upheld his conviction, explaining that because the United States was at war the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half-a-century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed, unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief. Filing and printing costs were paid by the MacArthur Justice Center at The University of Chicago Law School.

[2] 323 U.S. 214 (1944).

SUMMARY OF ARGUMENT

Petitioners in these cases have been deprived of their liberty for extended periods of time without any opportunity for a fair hearing before a competent tribunal to determine whether there is any factual or legal basis for their confinement and without any assistance of counsel. Unlike Fred Korematsu, who was at least permitted to challenge in court the constitutionality of his internment, the Petitioners have been denied even that fundamental right. The United States insists that this denial of even minimal due process is constitutional and federal courts lack jurisdiction to review that determination because the United States is at war.

Although the specific legal issues presented in these cases differ from those the United States has faced in the past, the extreme nature of the government's position is all-too-familiar. It may be that it is essential in some circumstances to compromise civil liberties in order to meet the necessities of wartime, but history teaches that we tend too quickly to sacrifice these liberties in the face of overbroad claims of military necessity. Fred Korematsu's experience is but one example, of many.

In this instance, the claim, accepted in effect by the courts below, that the government may detain individuals indefinitely without any fair hearing overreaches the bounds of military necessity. To avoid repeating the mistakes of the past, this Court should make clear that the United States respects fundamental constitutional and human rights – even in time of war.

ARGUMENT

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should

tighten the measures it ordinarily takes to preserve our security. But we know from long experience that we often react too harshly in circumstances of felt necessity and underestimate the damage to civil liberties. Typically, we come later to regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

I. TIME AND AGAIN, IN PERIODS OF REAL OR PERCEIVED CRISIS, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES

History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily*. The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated

claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not unnecessarily impair individual freedoms and the traditional separation of powers.

A. THE ALIEN AND SEDITION ACTS OF 1798

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.[3]

The Republicans opposed these measures, leading Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans "would sink the glory of our country and prostrate her liberties at the feet of France."[4] Against this backdrop, and in a mood of patriotic fervor, the Federalists enacted the Alien and Sedition Acts of 1798.

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[3] James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (New Haven: Yale, 1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* 195 (New York: Free Press, 1975).

[4] Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont, June 25, 1798, in Charles Francis Adams, ed., 9 *The Words of John Adams* 202 (Boston: Little, Brown, 1854).

The Alien Friends Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.[5] Congressman Edward Livington aptly observed in opposition to the Act that with "no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion."[6] The Alien Friends Act expired on the final day of President Adams's term of office, and has never been renewed.

The Sedition Act of 1798 prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute.[7] The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against every influential Republican newspaper and the most vocal critics of the Adams administration.[8]

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[5] *See* An Act Concerning Aliens, 5th Cong., 2d Sess., in 1 *The Public Statutes at Large of the United States of America* 570-72 (Boston: Little, Brown, 1845). The Alien Enemies Act, which was adopted at the same time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy.

[6] 8 *Annals of Congress* 2006-11 (Gales and Seaton 1851).

[7] *See* An Act for the Punishment of Certain Crimes against the United States, 5th Cong., 2d Sess., in 1 *Public Statutes at Large* 596-97.

[8] *See* John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951); James Morton Smith, *Freedom's*

(Continued on following page)

The Sedition Act also expired on the last day of Adams's term of office. The new President, Thomas Jefferson, pardoned those who had been convicted under the Act, and forty years later Congress repaid all the fines.[9] The Sedition Act was a critical factor in the demise of the Federalist Party, and the Supreme Court has often reminded us in the years since that the Sedition Act of 1798 has been judged unconstitutional in the "court of history."[10]

B. THE CIVIL WAR: THE SUSPENSION OF *HABEAS CORPUS*

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. Some of these orders were more warranted than others. The most extreme of the suspensions, which applied throughout the entire nation, declared that "all persons . . . guilty of any disloyal practice . . . shall be subject to court martial."[11]

Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1956).

[9] Cong. Globe, 26th Cong, 1st Sess. 411 (May 23, 1840). *See* 26th Cong., 1st Sess., Doc. 86, House Rep.

[10] *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

[11] Roy P. Basler, ed., 5 *The Collected Works of Abraham Lincoln* 436-437 (New Brunswick, N.J.: Rutgers University Press, 1956).

Under this authority, military officers arrested and imprisoned as many as 38,000 civilians, with no judicial proceedings and no judicial review.[12]

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*[13] that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. As Chief Justice Rehnquist has observed, *Milligan* "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[14]

C. WORLD WAR I: THE ESPIONAGE ACT OF 1917

When the United States entered World War I, there was widespread opposition to both the war and the draft. Many citizens argued that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier.

President Wilson had little patience for such dissent. He warned that disloyalty "must be crushed out" of

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[12] *See* Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York and Oxford: Oxford University Press, 1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998).

[13] 4 Wall. (71 U.S.) 2 (1866).

[14] William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (New York: Vintage Books, 1998).

existence[15] and declared that disloyalty "was ... not a subject on which there was room for ... debate." Disloyal individuals, he explained, "had sacrificed their right to civil liberties."[16]

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.[17] Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.[18] The Wilson administration's intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[19]

In fact, the government worked hard to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information, which

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[15] Woodrow Wilson, "Third Annual Message to Congress," quoted in David M. Kennedy, *Over Here: The First World War and American Society* 24 (New York: Oxford University Press, 1980).

[16] Quoted in Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (New York: Norton, 1979).

[17] Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219.

[18] *See* Geoffrey R. Stone, *Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, *The Origins of the "Bad Tendency Test": Free Speech in Wartime*, 2003 Sup. Ct. Rev. 411

[19] New York Times 3 (Nov. 21, 1917).

produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all designed to instill a hatred of all things German and of all persons whose "loyalty" might be open to doubt.[20]

The government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft, and in an atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment – often 10 to 20 years in prison – to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.[21] But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.[22]

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920 – most notably *Schenck*,[23] *Debs*,[24] and *Abrams*[25] – the Court consistently upheld the convictions of individuals who had agitated against the war and the draft – individuals as obscure as

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[20] *See* Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (Ithaca: Cornell University Press, 1960).

[21] *See* Zechariah Chafee, *Free Speech in the United States* 52 (Cambridge: Harvard University Press, 1941)

[22] Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

[23] *Schenck v. United States*, 249 U.S. 47 (1919).

[24] *Debs v. United States*, 249 U.S. 211 (1919).

[25] *Abrams v. United States*, 250 U.S. 616 (1919).

Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaflets written in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President. As Harry Kalven once observed, the Court's performance was "simply wretched."[36]

In December 1920, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.[37] Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.[38]

D. THE RED SCARE: 1919-1920

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and spectacular bombings triggered the period of public paranoia that became known as the "Red Scare" of 1919-1920. Attorney General A. Mitchell Palmer announced that the bombings

[36] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (New York: Harper & Row, 1988).

[37] Cong. Rec. 66th Cong., 2d Sess. 293-94 (Dec. 13, 1920).

[38] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

were an "attempt on the part of radical elements to rule the country."[39]

Palmer established the "General Intelligence Division" within the Bureau of Investigation and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID unleashed a horde of undercover agents to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the "alien filth" captured in these raids as creatures with "sly and crafty eyes, lopsided faces, sloping brows and misshapen features" whose minds were tainted by "cupidity, cruelty, and crime."[40] More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the government had acted without legal authorization and without complying with the minimum standards of due process.[41] This report marked the beginning of the end of this era. As the *Christian Science Monitor* observed in June 1920, "in the light of what is now known, it seems clear that what appeared to be an excess

[39] Quoted in Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920*, 9 (New York: McGraw-Hill, 1955).

[40] "Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others," Hearings before the Comm. on Rules, House of Representatives 27 (1920).

[41] See National Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (1920).

of radicalism" was met with a real "excess of suppression."[32] In 1924, Attorney General Harlan Fiske Stone ordered an end to the Bureau of Investigation's surveillance of political radicals. "A secret police," he explained, is "a menace to free government and free institutions."[33]

E. WORLD WAR II: INTERNMENT

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to "designate military areas" from which "any persons may be excluded."[34] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything.

[32] Christian Science Monitor (June 25, 1920).

[33] Quoted in Max Lowenthal, *The Federal Bureau of Investigation* 298 (New York: Sloane, 1950).

[34] Executive Order No. 9066, 7 Fed. Reg. 1407 (1942). On March 21, 1942, Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander was unlawful. Act of June 25, 1948, ch. 645, 62 Stat. 765 (codified as 18 U.S.C. § 1383) (1974) (repealed 1976).

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.[35]

In *Korematsu v. United States*,[36] this Court, in a six-to-three decision, upheld the President's action. The Court offered the following explanation:[37]

> [We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . .
>
> Korematsu was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the [] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot – by availing ourselves of the calm perspective of hindsight – say that these actions were unjustified.

On February 19, 1976, as part of the celebration of the Bicentennial of the Constitution, President Gerald Ford

[35] See Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington D.C.: Government Printing Office, June 1983); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (Seattle: University of Washington Press, 2003).

[36] 323 U.S. 214 (1944). See also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of the curfew order); *Yasui v. United States*, 320 U.S. 114 (1943) (same).

[37] 323 U.S. at 219-20, 223-24.

issued Presidential Proclamation 4417, in which he acknowledged that, in the spirit of celebrating our Constitution, we must recognize "our national mistakes as well as our national achievements." "February 19th," he noted, "is the anniversary of a sad day in American history," for it was "on that date in 1942 . . . that Executive Order 9066 was issued." President Ford observed that "we now know what we should have known then" – that the evacuation and internment of these individuals was "wrong." Ford concluded by calling "upon the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated."[38]

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1983, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[39]

Shortly thereafter, lower federal courts granted extraordinary writs of *coram nobis* in the *Korematsu* and *Hirabayashi* cases, finding that government officials had known at the time of the internment decision that there

[38] Presidential Proclamation 4417, "An American Promise," February 19, 1976, quoted in Eric K. Yamamoto, et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 400 (Gaithersburg, Md.: Aspen, 2001).

[39] Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 5, 8 (Washington D.C.: Government Printing Office, June 1983).

had been no military necessity and that government officials had intentionally deceived the Supreme Court about this state of affairs.[40]

In vacating Fred Korematsu's forty-year-old conviction because it was the result of "manifest injustice," Federal District Judge Marilyn Hall Patel emphasized the need for both executive branch accountability and careful judicial review:[41]

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability . . . .

In 1988, President Reagan signed the Civil Liberties Restoration Act, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons," and offered a formal presidential apology and reparations to each of the Japanese-American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the United States government.[42] This Court's decision in *Korematsu* has become a constitutional pariah.

[40] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Gordon Hirabayashi also successfully filed a petition for a writ of *coram nobis*. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). *See also* Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 Amerasia Journal 51 (2002).

[41] *Korematsu*, 584 F. Supp. at 1420.

[42] 102 Stat. 903, Public Law 100-383 (Aug. 10, 1988) (codified at 50 U.S.C. § 1989(b)) (1996).

The Supreme Court has never cited it with approval of its result.[43]

F. THE COLD WAR: LOYALTY OATHS AND MCCARTHYISM

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. With the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of "loyalty" quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World."[44]

But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarren Act, which required the registration of all Communists. Truman explained that the Act was the product of "public hysteria" and would lead to "witch hunts."[45] Congress passed the Act over Truman's veto.[46]

In 1954, Congress enacted the Communist Control Act,[47] which stripped the Communist Party of "all rights, privileges, and immunities." Only one Senator, Estes

[43] *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 Sup. Ct. Rev. 455, 485 n 99.

[44] See David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (New York: Simon and Schuster 1978).

[45] New York Times (Sept. 21, 1950).

[46] 64 Stat. 987, 50 U.S.C. § 67.

[47] 68 Stat. 775, 50 U.S.C. § 841.

Kefauver, dared to vote against it. Irving Howe lamented "this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy."[48]

Hysteria over the "Red Menace" swept the nation and generated a wide range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged "subversives"; abusive legislative investigations designed to punish by exposure; public and private blacklists of those who had been "exposed"; and criminal prosecutions of the leaders and members of the Communist Party of the United States.[49]

This Court's response was mixed. The key decision was *Dennis v. United States*,[50] which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard – even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.[51]

[48] Irving Howe, "The Shame of U.S. Liberalism," 1 Dissent 308 (Autumn, 1954).

[49] *See generally* Ralph S. Brown, *Loyalty and Security* (New Haven: Yale University Press, 1958); Caute, supra note 43; Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* (New York: Alfred A. Knopf, 1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978).

[50] 341 U.S. 494 (1951).

[51] See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 211 (New York: Harper & Row, 1988); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375.

Over the next several years, the Court upheld far-reaching legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment.[13] In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism. In later years, the Court effectively overruled *Dennis* and its progeny, recognizing once again that the nation had been led astray by the emotions and fears of the moment.[14]

II. TO AVOID A REPETITION OF PAST MISTAKES, THIS COURT SHOULD CLOSELY SCRUTINIZE THE GOVERNMENT'S CLAIMS OF "MILITARY NECESSITY" IN THESE CASES TO ENSURE THAT CIVIL LIBERTIES ARE NOT UNNECESSARILY RESTRICTED

As in past episodes, the issues raised in these cases involve a direct conflict between our most precious civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make mistakes in the present. We should learn from our experience.

During World War I, John Lord O'Brian served as Special Assistant Attorney General in charge of the War

[13] *See, e.g, Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1949).

[14] *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

Emergency Division of the Department of Justice. In this capacity, he played a central role in enforcing the Espionage Act of 1917. Four decades later, reflecting on his own experience, O'Brian cautioned against the "emotional excitement engendered . . . during a war," and warned that "the greatest danger to our institutions" may rest, not in the threat of subversion, but "in our own weaknesses in yielding" to wartime anxiety and our "readiness to . . . disregard the fundamental rights of the individual." He expressed the hope that "our judges will in the end establish principles reaffirming" our nation's commitment to civil liberties.[34]

As Chief Justice Rehnquist has written, "[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[35] It is, he added, "both desirable and likely that more careful attention will be paid by the courts to the . . . government's claims of necessity as a basis for curtailing civil liberty."[36]

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.[37] *Korematsu* and *Dennis* are examples of this phenomenon.

[34] John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 Harv. L. Rev. 1, 3-4, 25 (1952). *See* John Lord O'Brian, *Changing Attitudes toward Freedom*, 9 Wash. & Lee L. Rev. 157 (1952).

[35] Rehnquist, supra note 12, at 224.

[36] *Id.*, at 225.

[37] *See id.*, at 222.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis.

This Court should make clear that the United States adheres to the rule of law even in wartime, and that even in wartime the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel.

This Court should make clear that, even in wartime, the United States does not abandon fundamental liberties in the absence of convincing military necessity. Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

GEOFFREY R. STONE
DAVID A. STRAUSS
STEPHEN J. SCHULHOFER

(2) (3) (24)

Nos. 03-334; 03-343; 03-6696

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* HON. JOHN J. GIBBONS, HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HAROLD R. TYLER, JR., HON. PAUL SIMON, CONRAD K. HARPER, DEBORAH L. RHODE AND JEROME J. SHESTACK IN SUPPORT OF PETITIONERS

DAVID J. BRADFORD
Counsel of Record
STEVEN MCMAHON ZELLER
MATTHEW T. ALBAUGH
WINSTON O. HUFF
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

These cases involve the limits of the Executive's powers to detain citizens of the United States and citizens of allied countries without charge, without access to counsel, and without any right to challenge the basis for their detention before a United States judge. Amici curiae, former federal judges, former government officials and lawyers, believe that while the questions presented in these three cases may be slightly different, in each case, the Executive has advanced, and the lower courts have accepted, a core position that threatens the role of the judiciary in safeguarding the rule of law in our national government. Therefore, pursuant to this Court's Rule 37.2, amici respectfully submit this brief in support of the petitions for certiorari filed by Petitioners Safiq Rasul, *et al.*, Fawzi Khalid Abdullah Fahad Al Odah, *et al.* and Yaser Esam Hamdi, *et al.*[2]

Hon. John J. Gibbons served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge from 1987 to 1990.

Hon. Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

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[1] The parties in all three petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel contributed monetarily to the preparation or submission of this brief.

[2] Case Numbers 03-334, 03-343 and 03-6696, respectfully. Amici believes that the common threat to the rule of law presented by the actions of the Executive against all Petitioners are appropriately addressed in a single brief for amici who are concerned about the rule of law.

Hon. Abner J. Mikva[3] served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress, representing portions of Chicago and its suburbs.

Hon. William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Hon. H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Hon. Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Hon. Paul Simon served two terms in the U. S. Senate and six terms in the U.S. House of Representatives, representing Illinois. He is currently a professor of political science and journalism.

Conrad K. Harper, a lawyer in private practice in New York City, served as Legal Adviser of the United States Department of State from 1993 to 1996 and is currently a member of the Permanent Court of Arbitration at The Hague. He has previously been a member of and held

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[3] As a former Judge of the United States Court of Appeals for the District of Columbia Circuit, Judge Mikva abstains from participating as an Amicus in the cases from that Circuit, and joins this Amicus brief only with respect to the *Hamdi* petition for writ of certiorari to the Fourth Circuit.

leadership positions in a range of other bar, human rights and international organizations.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law at the Stanford University School of Law and served as Senior Counsel to Minority Members of the Judiciary Committee of the U.S. House of Representatives in 1998.

Jerome J. Shestack, a lawyer in private practice in Philadelphia, served as president of the American Bar Association and in numerous other leadership positions of the ABA, including as chair of the Section on Individual Rights and Responsibilities.

SUMMARY OF THE ARGUMENT

In *Hamdi*, the Government maintains that the judiciary must accept, conclusively and uncritically, the justification advanced by the Executive for the indefinite detention of a U.S. citizen; in *Al Odah*, the Government maintains that the judiciary may not even inquire as to justifications, since the courthouse door is forever closed to foreign nationals who have not set foot within the "ultimate sovereignty" of the United States. In both cases, the Government's position is misguided, as each case contemplates indefinite Executive detention without adequate process. While the process due will vary with the circumstances, in no event may the Government claim the unfettered power to imprison people indefinitely – that is, unless that power is checked by affording the prisoners the correlative right to the rule of law.

The Petitioners seek judicial review of their indefinite incarceration by the Executive Branch of government. The decisions of the Circuit Courts below disregard one of the most basic and fundamental foundations of our system of government: the rule of law. In addition, the

courts below, in granting unprecedented deference to the decisions and statements of the Executive Branch, have ignored the responsibilities of the judiciary fairly and adequately to review those decisions when faced with a *habeas corpus* petition.

Amici recognize the paramount importance of our national safety. Amici also share the strong desire that our Government enjoy the necessary power and flexibility to prevent future terrorist attacks. But Amici respectfully suggest that the Due Process Clause is not an enemy of those efforts. Rather, it is an integral part of the values and liberty that this nation holds dear. Amici respectfully suggest that we should not forsake this defining heritage.

Section I of this amicus brief demonstrates that the Courts of Appeals' decisions are contrary to the rule of law and ignore the purposes of the Great Writ in protecting the rule of law. Section II demonstrates that providing petitioners with due process will not interfere with legitimate military interests. Section III demonstrates that, contrary to the decision in *Al Odah*, no policy or precedent warrants denying basic due process rights to citizens of friendly nations imprisoned by and in a territory under the exclusive jurisdiction and control of the United States.

ARGUMENT

I. THE DECISIONS OF THE COURTS BELOW ARE CONTRARY TO THE RULE OF LAW AND IGNORE THE PURPOSES OF THE GREAT WRIT IN PROTECTING THE RULE OF LAW

It is fundamental that the government may not take the life, liberty or property of a person without authority from the law itself. This fundamental precept is one of the cornerstones of our democracy. The Courts of

Appeals' decisions below have ignored the important role that the rule of law must play in times of crisis as well as peace.

A. The Decisions Below Are Contrary to the Rule of Law

The rule of law broadly encompasses both "procedural and substantive" limitations on government power. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003). It is generally agreed that the rule of law requires: 1) the supremacy of legal authority over officials as well as ordinary citizens; and 2) the availability of the courts to enforce the law and employ fair procedures. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997). When officials act to deprive individuals of liberty without legal authority and seek to deny the availability of the courts to review their actions, the rule of law is violated.

Petitioners in these cases have been subjected to indefinite detention by the Executive, under conditions created by the Executive and will most likely not face any sort of judgment regarding their continued detention. This consolidation of power is antithetical to the rule of law. Our system is a system of checks and balances. *Nixon v. United States*, 506 U.S. 224, 234-35 (1993). Our Founders warned against these circumstances in advocating for the adoption of our Constitution: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison).

It has been a hallmark of Anglo-American legal tradition that an independent and impartial judiciary be

available to protect against abuses of power carried out by the Executive. The guarantee that no man should be deprived of his liberty or property without review by the judiciary was extracted from King John and enshrined in the Magna Carta. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

Courts must also remain faithful to the rule of law, particularly when the popular political will calls for its elimination. In a case related to the treason trial of former Vice-President Aaron Burr, Chief Justice Marshall recognized that circumstances in which popular passions are high required more from the judiciary: "[a]s there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Marshall, C.J.).

The rule of law demands that the judicial process function in both times of crises and times of calm. Chief Judge Cranch's words in *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622), provide guidance in these proceedings:

> [i]n times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the

> duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events.

Bollman, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

Courts are entrusted with the duty of upholding the rule of law in the face of political or popular attempts to erode it. As Justice Harlan stated: "[i]t will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting). The detention of the Petitioners should be subjected to plenary review by this Court to ensure that the rule of law and our system of checks and balances prevail.

B. The Writ of Habeas Corpus Provides Petitioners with Judicial Review of Executive Branch Detentions

The writ of habeas corpus is a fundamental right critical to ensuring access to the rule of law. As Blackstone explained, the writ requires the government to furnish to a court a legal basis for its decision to deprive an individual of liberty:

> the glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *133. The objective of the writ "is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ upholds the rule of law "since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not." Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833).

It is undisputed that the writ applies to persons who have been detained pursuant to the orders of the Executive Branch. In fact, a more searching inquiry is appropriate in a habeas proceeding challenging the actions of Executive officials than when habeas is invoked as a remedy for post-conviction relief. *See Developments in the Law -- Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.").

The Framers of our Constitution specifically limited the situations in which the writ could be curtailed. *See*, U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Framers only provided the legislature with the power to suspend the writ. This ensured that an Executive with the power indefinitely to detain, could not on his own deprive the detained individual from having the detention examined by court. Past attempts by the Executive Branch to suspend the writ have met with judicial resistance. *Ex parte Merryman*, 17 F. Cas. 144, 148 (Cir. Ct. Md. 1861) (No. 9,487) (Taney, C.J.) ("I can

see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus . . . ."). The Legislative Branch has not suspended the writ. This Court should not countenance a *de facto* suspension by the Executive Branch.

II. PROVIDING PETITIONERS DUE PROCESS WILL NOT INTERFERE WITH LEGITIMATE MILITARY INTERESTS

The Executive asserts that undefined and amorphous exigencies of military conflict warrant the creation of a black hole in which the rule of law has limited, if any, application.

The Executive's argument ignores the time honored principle , forged in the heat of prior armed conflicts, that combat does not eviscerate the Constitution. "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The Constitution is applied "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *accord United States v. Robel*, 389 U.S. 258, 263-64 (1967). Courts and their procedural safeguards were established by our founders to protect civil liberties. *Ex parte Quirin*, 317 U.S. 1, 19 (1942). The founders were categorically opposed to a system of government that would place in the hands of one man the power to make, interpret and enforce the laws.

Amici do not dispute that federal courts should afford deference to the Executive in matters related to the

military and the conduct of the national defense. However, this deference is not unlimited. It diminishes by the degree to which the conduct at issue is remote from the threat alleged by the Executive to justify its actions; "[a]s necessity creates the rule, so it limits its duration." *Ex parte Milligan*, 71 U.S. at 121-22 (finding military trial of a citizen to be unconstitutional in a state whose courts were open, "needed no bayonets to protect it, and required no military aid to execute its judgments"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946).

The right to habeas corpus review is intended to check both military and civilian authority. James Madison stated that "unless these [military and civilian] departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." THE FEDERALIST NO. 48 (James Madison); *see also Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds.")

Courts that have addressed habeas corpus petitions in similar contexts have consistently expressed little reticence to exercise judicial review. Justice Story cautioned that the President during war "has a discretion vested in him . . . but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).

Later, in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court affirmed that the line between permissible

discretion and law is one that must be drawn by the judiciary:

> [i]t does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action [before the judiciary].

Id. at 400-01.

Further, in *Ex parte Quirin*, the Court rejected the notion that the Government's classification of the petitioners foreclosed their ability to challenge the legality of their detention in federal court:

> [t]he Government challenges each of [petitioner's] propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our country as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class by persons defined by the

> Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Ex parte Quirin, 317 U.S. at 24-25. The Court continued by stating that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals." *Id.* at 25.

Still further, the Court in *Youngstown Sheet & Tube Co. v. Sawyer* confirmed that the Founders purposefully failed constitutionally to grant the president unreviewable powers to be used as necessary in times of emergency. 343 U.S. at 588. Allowing the Executive Branch to operate under such a broad mandate would in effect make the president a monarch during times of crisis. Justice Jackson, in his concurrence, emphasized that the only way to ensure a free government is to require the Executive to be under the law. *Id.* at 655 (J. Jackson, concurring); *see also United States v. Lee*, 106 U.S. 196, 219 (1882) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual."); *Korematsu v. United States*, 584 F. Supp.

1406, 1420 (N.D. Cal. 1984) ("[T]he shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.").

This Court should thus continue a consistent legacy in providing due process to the Petitioners irrespective of a military conflict abroad.

III. NO POLICY OR PRECEDENT WARRANTS DENYING BASIC DUE PROCESS RIGHTS TO CITIZENS OF FRIENDLY NATIONS IMPRISONED BY AND IN A TERRITORY UNDER THE EXCLUSIVE JURISDICTION AND CONTROL OF THE UNITED STATES

The Court of Appeals' decision in *Al Odah* permits the Government to detain indefinitely certain Petitioners without a forum to dispute the legality of their detention and without access to even the most basic of due process rights. *Al Odah v. United States* 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("The consequence is that no court in this country has jurisdiction to grant habeas relief."). The decision is based upon the premise that Petitioners have not technically set foot within the "ultimate sovereignty" of the United States, although the Petitioners are purposely[4] imprisoned just ninety miles south of the Florida border at Guantanamo Bay, a territory under the exclusive control and jurisdiction of the United States. As justification for the withholding of all constitutional rights to Petitioners, the Government argues the

[4] American College of Trial Lawyers, *Report on Military Commissions for the Trial of Terrorists* 8 (Mar. 2003) ("[T]he placement of the detainees at Guantanamo, w[as] carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority.").

"ultimate sovereignty" over Guantanamo Bay rests with Cuba.

Yet no compelling policy or precedent exists for such a holding. The court below misread and over-extended relevant precedent, failed to reconcile decisions involving other territories over which the United States has jurisdiction and control, afforded the Executive unchecked and unreviewable authority over nonresident aliens of friendly nations and failed to recognize the flexible application of the Due Process Clause.

A. The Court of Appeals' Decision Extends *Johnson* Beyond Its Proper Holding and Fails to Reconcile Conflicting Opinions Affording Rights to Nonresident Aliens in Territories Outside the "Ultimate Sovereignty" of the United States

The Court of Appeals' decision in *Al Odah* relies heavily upon a strained reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the law of war in China could not seek habeas relief in the federal courts. Application of *Johnson* to Petitioners' cases is inappropriate because Petitioners here are neither convicted war criminals nor enemy aliens. Rather, they are citizens of nations friendly to our Government. And, unlike *Johnson*, Petitioners here are being held in a territory under the exclusive possession and control of the United States government.

The Courts of Appeals tied the federal court's jurisdiction to an artificial "ultimate sovereignty" test. In doing so, they elevated form over substance. Although the United States alone exercises power, control and jurisdiction over Guantanamo Bay and refuses to

recognize the authority of any international tribunal or foreign court, Cuba retains titular "ultimate sovereignty" over the land. In Guantanamo Bay, the United States has all "the basic attributes of full territorial sovereignty." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This includes "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id.*

The decision in *Al Odah* also conflicts with a long line of decisions relying upon this Court's decision in the *Insular Cases*, a series of cases from *Delima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Various courts have afforded the protection of fundamental constitutional rights to residents, aliens and citizens of similar territories, where the United States exercises control and jurisdiction but does not have ultimate sovereignty. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) (holding the Due Process Clause is applicable to government action taken against an alien in Panama Canal zone, an area leased by the United States); *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984) (finding Takings Clause applicable to both aliens and citizens of Marshall Islands and holding that "[a]ll of the restraints of the Bill of Rights are applicable to the United States wherever it has acted"); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977) (holding fundamental constitutional rights applicable to non-resident of Trust Territory of the Pacific Islands, a territory under the complete control and jurisdiction, but not ultimate sovereignty, of the United States); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (extending constitutional rights to non-resident aliens within American sector of Berlin, Germany).

Here, the Court of Appeals' decision encourages manipulation of the legal process and strips the courts of

jurisdiction under the guise of deferring to Cuba's ultimate, but unexercised, sovereignty.

B. The Court Should Accept Certiorari to Uphold the Judiciary's Power to Review the Unilateral Actions of the Executive Branch and to Recognize the Flexible Application of the Due Process Clause

By concluding that it was without authority to determine what process, if any, is due to Petitioners, the Court of Appeals in *Al Odah* also ignored the enormous practical flexibility which the Due Process Clause permits in its application. The Due Process Clause requires only such process as is due under the circumstances. *See Heller v. Doe*, 509 U.S. 312, 332 (1993) ("[F]lexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.") (quoting *Greenholtz v. Inmates of Nev. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)); *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (holding the process required depends on the balance of interests at stake).

Such flexibility ensures that the threshold determination – whether the Due Process Clause applies – will not compel imprudent results in circumstances involving national security.[5] Territorial considerations or the citizenship of the persons seeking due process alone should not be an exclusive basis for avoiding the provision of due process altogether. Rather, the key

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[5] The rule of law promises that "there exists a fair, rational, process through which one can protect one's interest." James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1447 (2001).

determination depends on the process rightfully due under the circumstances:

> [t]he proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place . . . [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.

Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) (emphasis in original). In the present case, where the Government actively denies Petitioners all liberty rights whatsoever, the "particular circumstances" cry out for the extension of at least the most basic of due process rights, including the right fairly to contest the legitimacy of their detention. The Government has denied Petitioners all basic due process rights for over eighteen months, and it argues that this Court should condone this limbo for an indefinite period.

In addition, the decision of the Court of Appeals ignores that the Government has alternatives for dealing with circumstances of war. It may treat detainees as prisoners of war. It may prosecute them under procedures specifically designed to safeguard national security. *See United States v. Bin Laden,* No. 98-Cr-1023, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001) (limiting access to confidential information). Each of these courses may permit detentions that are fully consistent with the rule of law. Instead, the Government has created an unprecedented alternative – a territory where it may indefinitely imprison citizens of friendly

nations without any compliance with the Geneva Conventions or any other rule of law of any kind. The notion that it is necessary to embrace lawlessness in order to defend liberty denigrates the practical wisdom of our founders in creating a tripartite sharing of authority, crafting a flexible Due Process Clause and affording Congress – not the Executive -- the authority to suspend the Great Writ.

The decisions below effectively provide our Executive unbridled authority in dealings with foreign citizens whom it imprisons in light of the tragic events of September 11, 2001. But unbridled, unchecked authority to any Executive, no matter how well-intentioned, runs counter to our system of law.

CONCLUSION

For the foregoing reasons, the petitions should be granted.

Respectfully Submitted,

David J. Bradford
Counsel of Record
Steven McMahon Zeller
Matthew T. Albaugh
Winston O. Huff
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Counsel for Amici Curiae

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In The Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER PRISONERS OF WAR AND EXPERTS ON THE LAW OF WAR IN SUPPORT OF PETITIONERS

JONATHAN M. FREIMAN
WIGGIN & DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

HAROLD HONGJU KOH*
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-8368

MICHAEL H. POSNER
LAWYERS COMMITTEE FOR HUMAN RIGHTS
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

**Counsel of Record*

Attorneys for Amici Curiae Former Prisoners of War and Experts On the Law of War

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are former U.S. soldier prisoners of war whose lives have been deeply affected by our enemies' compliance, or failure to comply, with the mandates of the Geneva Conventions, as well as experts on international human rights and humanitarian law, sometimes referred to as the law of war.[1]

Amici take no position on whether petitioner Hamdi has committed acts that warrant treatment as an enemy combatant.[2] Nevertheless, they file this brief to urge this Court to examine and reverse the Fourth Circuit's refusal to allow a U.S. citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions. *Amici* believe that the Fourth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.[3]

Douglas "Pete" Peterson served as a fighter pilot and commander in the U.S. Air Force from 1954-1981 and attained the rank of full colonel. In 1966, he was shot down over North Vietnam and spent six and a half years as a prisoner of war. From 1997-2002, Mr. Peterson served as U.S. Ambassador to Vietnam. Prior to his ambassadorship, he served three terms as a U.S. Congressman.

Leslie H. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families.

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[1] Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* use the term "enemy combatant" to mean a member of the armed forces of a nation with which the United States is at war.

[3] In short, *Amici* offer reasons why this Court should review the "treaty" element of Petitioner's second question presented.

When his B-17 bomber crashed on April 24, 1944, Mr. Jackson was captured by the German Army and transferred to a converted concentration camp. While the experience was harsh, Mr. Jackson's German captors treated him in accord with the Geneva Conventions of 1929. Mr. Jackson believes that his survival and health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Edward Jackfert, Paul Reuter, and Neal Harrington present a sharp contrast. Mr. Jackfert is former National Commander of American Defenders for Bataan & Corregidor, Inc. ("American Defenders"), an organization providing support for POWs held by the Japanese during World War II. Mr. Reuter is the National Adjutant and Legislative Officer for the American Defenders. In 1942, all three men were taken prisoner by Japan, which did not purport to follow the 1929 Geneva Conventions. Without the protection of the Conventions, all three men were forced to take part in the horrific Bataan Death March and forced into slave labor. During their years of captivity, they saw their compatriots starved, beaten, and killed.

Mary Robinson served as U.N. High Commissioner for Human Rights from 1997-2002. She previously served seven years as President of the Republic of Ireland, and 20 years as Senator.

Judge Patricia McGowan Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999, and as Chief Judge from 1986 to 1991. She served from 1999-2001 as a Justice on the International Criminal Tribunal for the Former Yugoslavia, a court with jurisdiction over grave breaches of the Geneva Conventions and other law of war violations.

Payam Akhavan served as Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

Mary Cheh is professor of law at George Washington Law School, a Director of the National Institute of Military Justice, and a Member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces.

Stephen Saltzburg is General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Marco Sassoli is a professor of international law at the University of Quebec and served as deputy head of legal division of the International Committee of the Red Cross, the international body charged with implementing the Geneva Conventions.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Faced with the torture and inhumane treatment of soldiers captured during the two world wars, nearly half a century ago, nations throughout the world ratified the four Geneva Conventions. The third of these, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention or GPW], confers upon captured soldiers substantive and procedural protections designed to check a detaining power's basest impulses. Central to these protections is a detainee's right to be treated as a prisoner of war [hereinafter POW], unless and until his status – or even his innocence – has been determined by a "competent tribunal."

The United States has ratified all four Geneva Conventions, making them the supreme law of the land. U.S. Const. art. VI. It has also directly incorporated language from the Convention into binding military regulations. Finally, it has faithfully adhered to the requirements of the GPW in every conflict since World War II. The United States' compliance has been based on both legal obligation and enlightened self-interest: the nation's recognition that its commitment to the Conventions is central to the protection of U.S. soldiers abroad.

The United States' treatment of Petitioner radically departs from this settled law and history. Yaser Hamdi is alleged to have been a soldier serving with Afghan government forces and captured on a battlefield by Northern

Alliance troops, then transferred to U.S. custody. He has been detained indefinitely, incommunicado, without the protections mandated by the Convention. The United States has denied him POW status, but has apparently never brought him before a competent tribunal that has determined him ineligible for such treatment. Nor has Hamdi ever been given the opportunity to question whether he was a combatant at all.

Hamdi now challenges that treatment, asserting in part that the Convention gives him these basic dignities. The Fourth Circuit swept aside the Convention's clear requirement that a captured combatant be treated as a POW unless and until a competent tribunal determines him ineligible for such treatment. Its ruling ignored both military regulations directly incorporating those directives as well as this nation's long and proud tradition of convening tribunals to settle disputes over a prisoner's status. That was a grave error, which calls for correction under this Court's plenary jurisdiction.

This Court should grant certiorari to affirm the clear text of the Convention, which under the Supremacy Clause constitutes the supreme law of the land. The Court should reaffirm that the writ of habeas corpus is the proper mechanism by which the legality of detention may be challenged. By so doing, this Court would improve the chances that U.S. servicemen and women captured abroad will be treated as the drafters and U.S. ratifiers of the Convention intended.

I. THE FOURTH CIRCUIT RADICALLY DEPARTED FROM THE SETTLED UNDERSTANDING AND APPLICATION OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

The United States has consistently recognized as legally binding the unambiguous directives of the Convention. The Convention requires all contracting parties, including the United States, to treat those captured in the course of armed conflict as POWs "from the time they fall

into the power of the enemy and until their final release and repatriation." Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 [hereinafter Article 5]. There is one – and only one – exception to that requirement:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal.*

Id. at 3324 (emphasis added).

The meaning of this clear language has been undisputed by the United States since its ratification of the Convention in 1955. Every department of the United States military has incorporated the language of the Convention directly into its binding regulations regarding the treatment of wartime detainees:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal.*

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997) (emphasis added) [hereinafter AR 190-8].[4] The same authoritative source directs that a "competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war . . . " AR 190-8, §1-6(b). Furthermore, U.S. Navy regulations

[4] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, Washington, D.C., October 1, 1997.

advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (emphasis added).[5]

Indeed, these sources explicitly provide detainees the opportunity to assert not only POW status, but also *innocence*. The multi-force regulation, for instance, authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian," AR 190-8, §1-6(e)(10), i.e., to assess the sort of claim that Hamdi (through his father) makes here.[6]

These military regulations accord with the practices faithfully adhered to by the U.S. military in every major conflict since World War II. During the Korean War, the United States military treated captured North Korean and Chinese soldiers as POWs under the Convention, even though neither the United States nor the United Nations

[5] The U.S. Marine Corps instructs its future officers to adhere to the GPW in their treatment of enemy prisoners – even if the enemy itself has violated the GPW – for two reasons: "a. This country is a law-abiding nation. It abides by international law and expects its individual citizens, especially servicemen, who are official representatives, to do likewise. The damage to our national interest and the adverse reaction of world public opinion as a result of non-adherence to the Geneva Convention by Americans would be serious[; and] b. A treaty such as the Geneva Convention of 1949, once ratified by the Senate, becomes part of the 'Law of Land Warfare'. Thus, violation of the Geneva Convention would be equal to violating a federal law." United States Marine Corps, *Lesson 9: Code of Conduct*, LESSON PLAN FOR NAVAL SCIENCE 313: MARINE CORPS LEADERSHIP THEORY AND TECHNIQUES 9 (2003), *available at* https://navy.rotc.psu.edu under "Naval Science Classes."

[6] It is impossible to know whether Hamdi has himself claimed entitlement to POW status, as he has been held incommunicado without any access whatsoever to a lawyer or his father. Given that Respondent has prevented Hamdi from having access to his counsel or next friend, we assume that Hamdi himself would claim status as either a privileged (lawful) belligerent or an innocent civilian mistakenly caught up in hostilities.

recognized either communist government. Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm. During the Vietnam War, the United States military directed that all combatants captured during military operations were to be accorded prisoner-of-war status, irrespective of the type of unit to which they belonged. U.S. Military Assistance Command for Vietnam (MACV), Directive No. 381-46, Annex A (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968). Another directive reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to [Prisoner of War] status is in doubt *until such time as his status has been determined by a competent tribunal.*" U.S. Military Assistance Command for Vietnam (MACV), Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice*, 62 Am. J. Int'l L. at 768 (emphasis added). The Vietnam directive explicitly identifies the Convention as "applicable law," *id.* at 771, and proclaims that "[n]o person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel." *Id.*

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to determine the status of detained enemy combatants during Operation Desert Storm. Dep't of Defense, CONDUCT OF PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. L at 577 (Apr. 1992) [hereinafter CONDUCT OF PERSIAN GULF WAR]. Dep't of the Army, LAW OF WAR WORKSHOP DESKBOOK 79 (Brian J. Bill ed., 2000) [hereinafter LAW OF WAR WORKSHOP DESKBOOK]. As a result, 310 individuals were granted POW status. All other detainees who came before the tribunals "were determined to be displaced *civilians* and were treated as refugees." CONDUCT OF THE PERSIAN GULF WAR at 663 (emphasis added).

Petitioner Hamdi is accused of having committed a belligerent act before falling into the hands of the Northern

Alliance. Straightforward application of these legal mandates, supported by unwavering military practice, demands that Hamdi be considered a POW unless and until a competent tribunal determines otherwise. In violation of the Convention and half a century of consistent military practice, Petitioner has been stripped of prisoner-of-war protections, denied a hearing by a competent tribunal under Article 5 of the GPW, and detained incommunicado and interrogated in a military brig for more than sixteen months.

II. THE FOURTH CIRCUIT'S REFUSAL TO FOLLOW ARTICLE 5 IGNORES THE TEXT, STRUCTURE AND HISTORY OF THE TREATY AND VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

The lower court dismissed Petitioner's reliance on the Convention, with the startling conclusion that the Convention poses "no purely legal barrier to Hamdi's detention." *Hamdi v. Rumsfeld*, 316 F.3d 450, 469 (4th Cir. 2003) [hereinafter *Hamdi III*]. In fact, a treaty's constitutional standing as supreme law of the land is well established – and the GPW's text and history make clear that a captured combatant must be treated as a POW unless and until a competent tribunal determines that he is not entitled to such treatment. The Fourth Circuit's dismissal of Hamdi's petition effectively denies the GPW its legal status under the Supremacy Clause. It also ignores the federal statute on which he bases his petition, which plainly states that the writ of habeas corpus may be granted to a person who is "in custody in violation of the Constitution or laws or *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added).

A. The Supremacy Clause Requires That Hamdi Be Treated As A POW Unless And Until A Competent Tribunal Determines He Is Not Entitled To That Status.

The Supremacy Clause declares:

> This Constitution, and the Laws of the United States made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. In parallel language, Article III explicitly confers on federal courts jurisdiction over cases involving treaties: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. The Convention, ratified by the United States nearly fifty years ago, *see* 6 U.S.T. 3316, 75 U.N.T.S. 135, 242, 246, is indisputably the "supreme Law of the Land," and federal "judicial Power" may employ it as a rule of decision.

The Fourth Circuit avoided these constitutional provisions, which would have required recognition of Petitioner's claim to a competent tribunal, by invoking the doctrine of "self-execution" of treaties. The Court concluded that Article 5 of the Convention does not "evidence[ ] an intent to provide a private right of action." *Hamdi III*, 316 F.3d at 468.[7] By so saying, the Fourth Circuit conflated two very different questions: whether the GPW provides a *private right of action* for a civil damages suit and whether it is a binding treaty that a U.S. court may enforce in a federal habeas proceeding. Here, the federal habeas corpus statute *expressly* provides Hamdi with a cause of action. The statute gives federal courts the power to grant the writ of habeas corpus to a person held

[7] A self-executing treaty is one that operates as law without requiring implementing legislation. *See Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) ("An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.").

in "custody in violation of the . . . *treaties* of the United States. . . . " 28 U.S.C. § 2241(c)(3) (emphasis added). As the U.S. Military has itself long recognized, the Convention – as a "law . . . of the United States" – provides the legal rule by which this habeas petition – brought on a statutory cause of action – must be judged. *See* LAW OF WAR WORKSHOP DESKBOOK, ch. 5, § IV(E)(3), at 85 (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights").[8]

The Fourth Circuit's "self-executing" analysis becomes relevant only if one concludes (improperly) that the habeas statute does not allow a petition premised on "custody in violation of the . . . *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Yet this Court's most recent consideration of the issue instructs simply that a treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States," *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).[9]

As the Convention's text and history make clear, *see infra*, section II.B, Article 5 plainly "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Edye v. Robertson*, 112 U.S. 580, 598 (1884), Under this Court's precedents, then, Article 5 of the treaty is "binding alike [on] National and state courts, and is

[8] The Fourth Circuit thought it odd that if the habeas statute provided a cause of action, a habeas court using a rule of decision from the Convention might constitute "a mechanism of enforceability that might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469. Aside from being speculative, the observation ignores the obvious fact that it is the very nature of a *domestic* statute that it "might not find an analogue in any other nation." *Id.*

[9] As *Edye v. Robertson*, 112 U.S. 580 (1884), noted, a ratified treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe *a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for *a rule of decision* for the case before it as it would to a statute." *Id.* at 598-99 (emphasis added).

capable of enforcement, and must be enforced." *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 273 (1909).

These precedents reflect the Framers' intent, as evidenced by the Constitutional text itself. As Justice O'Connor has explained, "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (T. Franck & G. Fox eds., 1996).[10]

While the precise facts surrounding Hamdi's capture remain in dispute,[11] no one disputes that the U.S. government has denied him GPW protections without convening a competent tribunal to determine his status, as required by Article 5. That denial violates the GPW, the constitutional provisions making that Convention the supreme law of the United States, and this Court's precedents. Accordingly, the Fourth Circuit's conclusion that "there is no purely legal barrier to Hamdi's detention," *Hamdi III*, 316 F.3d at

[10] *See also Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (declaring that the GPW "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]the GPW, insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the GPW provisions in issue here are a part of U.S. law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("It is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law. . . . ").

[11] *See, e.g., Hamdi v. Rumsfeld*, 337 F.3d 335, 360 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc) [hereinafter *Hamdi IV*] ("[I]t simply is not 'undisputed' that Hamdi was seized in a foreign combat zone.").

469, constitutes an error of constitutional magnitude that can be corrected only by this Court.

B. The Fourth Circuit's Reading Of The Convention Is Incompatible With The Text, History And Structure Of The Convention.

The Fourth Circuit did not deny that officials of the United States must abide by the Convention or that the clear text of Article 5 of the Convention requires treating a person captured in battle as a POW unless and until a competent tribunal finds he is not entitled to such treatment. Rather, it concluded that the GPW was "not self-executing" because it created only "diplomatically-focused rights." *Hamdi III*, 316 F.3d at 469. But as one court has recognized, "the ultimate goal of Geneva III [GPW] is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations," *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). While the Convention recognizes diplomatic means for resolving differences, its Article 5 "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Edye,* 112 U.S. at 598-599, and thus "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines*, 466 U.S. at 252 (analyzing Warsaw Convention). As a self-executing treaty provision, Article 5 of the GPW provides a cause of action even if the habeas statute does not.

Whatever the source of the cause of action, the *text* of the Convention makes clear that a captured soldier may invoke his rights. Article 6 states clearly that no agreement among States "shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the *rights* that it confers upon *them*." Convention, art. 6 (emphasis added). The Convention expressly secures rights to "persons . . . who have fallen into the power of the enemy." Convention, art. 4. The GPW repeatedly refers to "*persons* protected by the present Convention," *id.*, art. 10 (emphasis added), and to "protected persons," *id.*, art. 11. Article 7 provides that "[p]risoners of war may in no

circumstances renounce in part or in entirety the *rights secured to them* by the present Convention." *Id.*, art. 7. Ignoring this text, the Fourth Circuit simply asserted that a Convention replete with the language of individual rights should be read to rely *only* on diplomatic enforcement. Moreover, Article 7 of the Convention would nonsensically forbid prisoners of war to renounce "rights" which, under the Fourth Circuit's interpretation, they do not possess.[12]

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[12] Similarly, the *history* and *structure* of the treaty make clear that the Convention is self-executing. In 1949, states parties negotiated a substantially revised version of a prior international convention. The predecessor convention required signatory states merely to "respect[ ]" the convention. 1929 Convention Relative to the Treatment of Prisoners of War, art. 82(1), July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Convention] ("The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances."). In 1949, the drafters crafted a new provision that requires states parties not only "to *respect*" the Convention, but also "to *ensure* respect for the present Convention in all circumstances." Convention, art. 1 (emphasis added). The treaty makers underscored the significance of this change by moving this language from the rear of the document, Article 82, to the front, Article 1. The additional language and the restructuring worked a fundamental change. By ratifying the Convention, each party necessarily undertook to treat it as binding law within its own legal system. As the official Commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of *unilateral engagements* solemnly contracted before the world as represented by the other Contracting Parties.

Jean de Preux et al., GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 17-18 (1960) [hereinafter OFFICIAL COMMENTARY] (emphasis added).

To "ensure respect" for the Convention, the drafters introduced Article 5 as a key innovation in the 1949 Convention. By requiring status determinations by a competent tribunal, the Convention created a new check on executive power that was absent from the predecessor 1929 Convention. *Compare* Convention, art. 5, *with* 1929 Convention. The drafters of Article 5 recognized "that decisions which might have the gravest consequences should not be left to a single person . . . [but] *taken to a court*." OFFICIAL COMMENTARY at 77 (emphasis added). The

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The lower court's claim that diplomacy, not Article 5, provides the *sole* mechanism to vindicate the rights of the captured runs squarely contrary not only to text, but also to logic. The Convention was designed to have force in cases of armed conflict, i.e., precisely when normal diplomatic channels are most ineffective or unavailable and unilateral respect for humanitarian law by States Parties is most crucial. *See* OFFICIAL COMMENTARY at 18.[13] The Fourth Circuit's anomalous conclusion that Convention rights may be enforced only by diplomatic means would leave the Convention's application at the mercy of the detaining country. The U.S. government could unilaterally withdraw Convention protections from Afghan prisoners just as

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drafters considered and expressly rejected a formulation of the new article that would have simply left status determination to a "responsible authority," instead insisting in Article 5 that the determination of a detainee's status should be made by a "competent tribunal." *Id.*

[13] The Third Geneva Convention does not have a nationality requirement for POW status. Significantly, this omission contrasts with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), which expressly requires diversity of nationality with the detaining power as a precondition for protected status. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290. The International Committee of the Red Cross has long held that a nation's own citizen captured in a conflict between two States Parties to the Convention is entitled to POW protections, including an Article 5 hearing. *See* R.J. Wilhelm, *Peut-On Modifier Le Statut Des Prisonniers De Guerre?*, 53 Revue Internationale de la Croix-Rouge 516, 685-88 (1953). *See also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (finding baseless the contention "that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle" under the 1929 Geneva Convention and holding that detention as POW was legal where petitioner objected to classification only on account of American citizenship); Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 76 (1977) (concluding that international law requires "that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality . . . ") [hereinafter PRISONERS OF WAR].

Germany unilaterally sought to avoid compliance with the 1929 Convention with respect to Polish prisoners – by arguing that the Convention had ceased to apply to Poles once their government had been destroyed. *See* PRISONERS OF WAR at 11-12.

The *legislative history* surrounding the ratification of the Geneva Conventions by the United States likewise reveals a deep understanding that the act of ratification created legally binding domestic obligations. In recommending consent to ratification of the Convention, the Senate Foreign Relations Committee underscored that, with ratification, the United States would make *binding* what had previously been matters of mere policy and practice. The substantive provisions of the Convention would operate not as hortatory principles effective mainly as rhetorical tools in diplomatic negotiations, but as legal *injunctions*:

> Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. As emphasized in this report, the requirements of the four conventions to a very great degree reflect the actual policies of the United States in World War II. The practices which they *bind* nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the *injunctions* of formal treaty obligations.

S. Rep. No. 84-9, at 32 (1955) [hereinafter RATIFYING REPORT] (emphasis added). The Committee urged strict adherence to the Convention, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the *obligations* of decent treatment which it has freely assumed in these instruments." *Id.* (emphasis added). The Committee concluded that adoption of these rights was the best way to secure better treatment for U.S. soldiers, based on the experiences of U.S. soldiers captured during the Korean War:

> If it be objected that the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized

> norms, it is also true that without the convention, that treatment could have been still worse.

Id. at 31.

To ensure that the Convention would be fully implemented by the United States, the Senate Foreign Relations Committee combed through the provisions of each of the four conventions to determine which provisions, if any, required implementing legislation. Only four were found to require implementing legislation, none of which are applicable here.[14] Aside from these, no further legislation was deemed "required *to give effect* to the provisions contained in the four conventions." *Id.* at 30 (emphasis added). Given the clarity of its textual requirements, Article 5 was not included among those few provisions for which the Committee deemed implementing legislation necessary. *Id.* The Senate's conclusion that some *but not all* provisions required implementing legislation casts serious doubt on the Fourth Circuit conclusion that *all* provisions of the Convention are non-self-executing.[15] *Hamdi III*, 316 F.3d at 468.

[14] The implementing legislation deemed necessary was as follows: 1. Changes in 18 U.S.C. § 706 relative to restrictions on the use of the Red Cross emblem by commercial enterprises; 2. Legislation to provide workmen's compensation for civilian internees; 3. Legislation to exempt relief shipments from import, customs and other dues; 4. Penal measures to enforce provisions that only prisoner of war camps may be identified by the letters PW, PG or IC. RATIFYING REPORT at 30-31. In contrast, the Committee viewed the requirement under Article 129 that States Parties criminalize "grave breaches" of the Conventions already to have been met by the existing criminal code. *Id.* at 27. When the Senate determined decades later that American obligations under Article 129 were not being fully met by existing criminal statutes, Congress enacted the War Crimes Act, 18 U.S.C. § 2441 (2000), to bring the U.S. *See id.* (stating purpose "[t]o carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.")

[15] The Fourth Circuit relied heavily on the enforcement provision of Article 11 of the Convention for its argument that the Convention's values are to be vindicated by diplomatic means alone. However, Article 11 is not on point, as it concerns the procedure for resolving disputes as

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In sum, by ratifying the Geneva Conventions, the Senate plainly intended legally to bind the United States to policies that it had concluded were in the best interests of U.S. soldiers. Moreover, it intended to bind future Executives even though the Senate anticipated that future enemies might "invoke specious reasons to evade compliance with the obligations ... freely assumed in these instruments." RATIFYING REPORT at 32. That binding obligation was to endure whether or not a future Executive shared President Eisenhower's concern that the United States "would not want to give [an enemy] the excuse or justification for treating our prisoners more harshly than he was already doing." Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1948). By ratifying the Convention, the Senate made it "the supreme law of the land, binding alike National and state courts, [which] is capable of enforcement, and must be enforced" to ensure that captured combatants are treated in accord with the Conventions. *Maiorano*, 213 U.S. at 273.[16]

III. THE FOURTH CIRCUIT'S RULING ENDANGERS U.S. TROOPS AND CIVILIANS ABROAD.

Finally, the integrity of the Geneva Conventions is crucial to the safety and security of U.S. troops and civilians abroad. As the ratifiers explained:

> If the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved

to *meaning*, not as to *compliance* with a settled interpretation, responsibility for which clearly rests with each of the parties under Article 1.

[16] The Fourth Circuit also noted certain "questions" that it had about how Article 5 would work if it were mandated. *Hamdi III*, 316 F.3d 469. But as shown in Part I, *supra*, the United States has a long and proud tradition of convening "competent tribunal[s]" to assess the status of captured combatants.

> because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.

RATIFYING REPORT at 32.

Treating those captured in a war zone according to basic shared standards means that our own captured forces stand a much better chance of surviving captivity unharmed. By ignoring that goal, the Fourth Circuit not only ignores the plain text of the law, but also places Americans around the world at grave risk of the very treatment that the Geneva Conventions aim to prevent.

For more than half a century, the Geneva Conventions have led to better treatment for Americans who fall into the hands of an enemy power. As Senator John McCain, himself a former POW, explained on the fiftieth anniversary of the Geneva Conventions:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions. . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.[17]

The Fourth Circuit declared that no court can require the Executive to honor its obligation to follow duly ratified treaties of the United States, effectively withdrawing this nation from that legally constituted "international consensus." At bottom, the Fourth Circuit's ruling invites other nations to treat captured U.S. soldiers just as the current U.S. Executive claims it may treat captured soldiers: not

[17] Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http://www.senate.gov/~mccain/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=820.

by law, but by shifting political perceptions of momentary needs. Yet it is the *binding* nature of the Convention that has guaranteed lawful treatment for U.S. soldiers.

Because the Fourth Circuit's decision leaves the Executive free unilaterally to strip captured detainees of POW status without Geneva Convention processes, it also jeopardizes any U.S. *civilians* present in a war zone. According to the Fourth Circuit, the Convention rights of anyone apprehended in a war zone, whether soldier or civilian, may be protected only by diplomatic intervention from the apprehended person's own country – whether or not his country is the detaining power. *Hamdi III*, 316 F.3d at 468-469. As Judge Luttig warned, this interpretation has dire consequences:

> The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state.

Hamdi IV, 337 F.3d at 358 (Luttig, J., dissenting).

Such civilians could find themselves detained indefinitely without a fair determination of their status. As Judge Motz pointed out, the ruling below would mean that "any American citizen seized in a part of the world where American troops are present . . . could be imprisoned indefinitely . . . if the Executive asserted that the area was a zone of active combat." *Id.* at 372 n.3 (Motz, J., dissenting). Deprived by the Fourth Circuit of any individual procedural rights under Article 5 and without recourse to diplomatic protests by the U.S. government, a journalist or aid worker erroneously detained by the United States would lack any means of rectifying the error of her detention. Perversely, then, the Fourth Circuit's ruling leaves U.S. citizens erroneously detained in a war zone by the U.S. government in a *worse* legal position than aliens detained by the United States, who might at least place hope in diplomatic processes.

CONCLUSION

The Fourth Circuit's radical departure from binding law, uniform military practice, and sound policy raises questions of fundamental importance that this Court should address. For the foregoing reasons, *Amici* urge this Court to grant the writ and reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JONATHAN M. FREIMAN
WIGGIN & DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

HAROLD HONGJU KOH*
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-8368

MICHAEL H. POSNER
LAWYERS COMMITTEE FOR
HUMAN RIGHTS
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

**Counsel of Record*

Attorneys for Amici Curiae Former Prisoners of War and Experts On the Law of War

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No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOINT APPENDIX

FRANK W. DUNHAM, JR.
LARRY W. SHELTON
GEREMY C. KAMENS

Office of the Federal Public Defender
830 E. Main Street, Suite 1100
Richmond, Virginia
(804) 343-0800

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

LAWRENCE R. LEONARD
Managing Assistant United States Attorney

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-4283

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No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOINT APPENDIX

FRANK W. DUNHAM, JR.
LARRY W. SHELTON
GEREMY C. KAMENS

Office of the Federal Public Defender
830 E. Main Street, Suite 1100
Richmond, Virginia
(804) 343-0800

PAUL J. McNULTY
United States Attorney

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

LAWRENCE R. LEONARD
Managing Assistant United States Attorney

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-4283

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U.S. District Court

Eastern District of Virginia (Norfolk)

CIVIL DOCKET FOR CASE #: 02-CV-439

Hamdi, et al v. Rumsfeld, et al

Filed: 06/11/02
Assigned to: Judge Robert G. Doumar
Referred to: Magistrate Judge James E. Bradberry
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2241 Petition for Writ of Habeas Corpus (Federal)

YASER ESAM HAMDI petitioner	Larry W. Shelton [COR LD NTC] Office of the Federal Public Defender 150 Boush St Suite 403 Norfolk, VA 23510 (757) 457-0808 Frank W. Dunham, Jr. [COR LD NTC] Office of the Public Defender One Capital Square 830 East Main Street Suite 1100 Richmond, VA 23219 (804 343-0800 Yaser Esam Hamdi [NTC] [PRO SE] Norfolk Naval Brig 825 Ingersoll Street Norfolk, VA 23511-2695
ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi petitioner	Esam Fouad Hamdi [NTC] [PRO SE] P.O. Box 240 Jubail, Saudi Arabia, 31951

00000001

DONALD H. RUMSFELD respondent	Lawrence Richard Leonard [COR LD NTC] Office of United States Attorney 101 West Main Street Suite 8000 Norfolk, VA 23510 (757) 441-6331 Gregory George Garre [COR LD NTC] U.S. Department of Justice Office of the Solicitor General 950 Pennsylvania Ave., NW Washington, DC 20530 ***N/A*** (202) 514-2201
COMMANDER W.R. PAULETTE respondent	Lawrence Richard Leonard (See above) [COR LD NTC] Gregory George Garre (See above) [COR LD NTC]

FRIENDS OF IMMIGRATION LAW ENFORCEMENT movant	

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/11/02	1	PETITION for writ of habeas corpus FILING FEE $5.00; RECEIPT #34685 (vwar)
6/11/02	--	CASE REFERRED to Magistrate Judge James E. Bradberry (vwar)
6/11/02	2	ORDER that the petition be filed; further ordering that this case and case 2:02cv348 and 2:02cv382 be consolidated; ordering that this case be consolidated with those cases subject to the USCA for the 4th Circuit allowing such consolidation; ordering that the federal public defender's office and/or Frank Dunham and/or Larry Shelton be appointed counsel for the petitioner; ordering that the respondents answer this order to show cause by 12:00 noon on 6/17/02; ordering that the respondents allow either Frank Dunham or Larry Shelton the opportunity to meet with Yaser Esam Hamdi within 72 hours of the entry of this order or immediately following the elimination of the AT[illegible] in this order, an interpreter with the appropriate government security clearance will be allowed to attend the meeting; ordering that this order is stayed until 5:00 p.m. on Friday, 6/14/02 to allow the respondents an opportunity to appeal this order or if the USCA allows a consolidation with the other pending cases until further order of the Court of Appeals, entered and filed 6/11/02 signed by Judge Robert G. Doumar) Copies Mailed: 6/11/02 [EOD Date: 6/11/02] (vwar)
6/12/02	3	U.S. Marshals return of service. Returned Executed as to Donald H. Rumsfeld, Commander W.R. Paulette 6/12/02 Answer due on 6/12/02 for Commander W.R. Paulette, for: Donald H. Rumsfeld (jcow)
6/12/02	4	ORDER that the petition be served upon the respondents and the US Attorney, directing the clerk to forward copies of both the petition and this order by fax and US mail to all counsel of record in the consolidated action, to Gregory Garre of the US Department of Justice, to the US Court of Appeals for the Fourth Circuit and to Yaser Esam Hamdi; further directing the clerk to forward a copy of both the petition and this order to the US Marshal for service of both upon the respondents and the US Attorney; directing the US Marshal's office to serve both the petition and this order upon the respondents and the US Attorney, entered and filed 6/12/02 signed by Judge Robert G. Doumar Copies Mailed: 6/12/02 [EOD Date: 6/12/02] (jcow)
6/13/02	5	NOTICE OF APPEAL by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
6/13/02	--	Copy of Notice of Appeal, Order and docket sheet to USCA copy of notice of appeal to respondent/appellant re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld; copy of notice of appeal to counsel of record (jcow)
6/13/02	6	Copy of USCA Order Granting the emergency motion for temporary stay and staying the district court's order of 6/11/02, pending this Court's ruling on appellants' motion for a stay pending appeal of that order; directing appellees to file a response to the motion for stay pending appeal to be received by the clerk no later than 2:00pm on 6/14/02. (jcow)
6/17/02	7	Copy of USCA Order Granting a stay of the district court's June 11 order in this case, the Court further stays all proceedings before the district court in connection with this detainee until resolution of this appeal and appeal No. 02-6827; all stays shall remain in effect pending further order of this Court; directing the parties to file briefs on the merits of the appeal. (jcow)
6/18/02	8	U.S. Marshal Service Process form Returned Executed as to Donald H. Rumsfeld, Commander W.R. Paulette 6/13/02 (jcow)
6/19/02	--	USCA Case Number Re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld CASE MANAGER: Lisa Jernigan USCA NUMBER: 02-6895 (jcow)
6/20/02	9	Copy of USCA Order directing tht oral argument in appeal No. 02-6895 be scheduled for 6/25/02 at 2:30 (jcow) (Entry date 06/21/02)

6/21/02	11	Two U.S. Marshals Service process receipt and return form. Returned Executed as to Donald H. Rumsfeld 6/12/02 (jcow)
6/27/02	12	SUMMONS Returned Executed as to Donald H. Rumsfeld [illegible] (jcow)
7/15/02	13	Advanced copy of Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld - REVERSED AND REMANDED by published opinion (lbax) [Entry date 07/16/02] [Edit date 07/17/02]
7/18/02	14	TRANSCRIPT OF PROCEEDINGS for dates of 7/18/02, before USDJ Robert G. Doumar, OCR - Penny C. Wile (vwar
7/18/02	15	Court Proceedings: RGD. USDJ. Counsel appeared. Came on for scheduling conference. Govt. to answer petition on or before 12:00 p.m., 7/25/02; replies due on or before 12:00 p.m., 7/30/02. Govt. to file any motion to terminate appointment of counsel on or before 12:00 p.m., 7/23/02. replies due on or before 7/24/02. Rule 26 disclosures due on or before 12:00 p.m., 7/22/02. (bwin)
7/19/02	16	Advanced copy of Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld 7/12/02 (jcow)
7/22/02	17	Respondents' Rule 26 Statement filed by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
7/22/02	18	ORDER that the US Attorney either submit the disclosures required by Rule 26 or make a proper motion for relief by 7/24/02 at noon, entered and filed 7/22/02 (signed by Judge Robert G. Doumar) Copies Mailed: 7/22/02 [EOD Date: 7/23/02] (jcow) [Entry date 07/23/02]
7/23/02	19	Response by Yaser Esam Hamdi to respondents' refusal to file Rule 26 disclosures filed [16-1] by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/23/02	20	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld to terminate appointment of counsel or in the alternative to require counsel to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met (jcow)
7/23/02	21	MEMORANDUM in support of [19-1] motion to terminate appointment of counsel or in the alternative to require counsel to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met by Commander W.R. Paulette, Donald H. Rumsfeld, received (jcow)
7/24/02	22	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [19-1] motion to terminate appointment of counsel by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/24/02	23	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's order dated July 18, 2002 requiring the government to file Federal Rule of Civil Procedure 26(a)(1) initial disclosures (jcow)
7/24/02	24	MEMORANDUM in support of [23-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's order dated July 18, 2002 requiring the government to file Federal Rule of Civil Procedure 26(a)(1) initial disclosures, received (jcow)
7/24/02	24	TRANSCRIPT of telephonic conference for date of 7/24/02

		before U.S. District Judge Robert G. Doumar. Penny [illegible] OCR. (jcow) [Entry date 07/25/02]
7/25/02	25	ANSWER to Complaint by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
7/25/02	26	MOTION with Memorandum in Support by Commander W.R. Paulette, Donald H. Rumsfeld to Dismiss (jcow)
7/25/02	27	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for Gregory George Garre to appear pro hac vice (jcow)
7/26/02	28	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [21-1] motion for relief from this court's July 18, 2002 order by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/26/02	29	REPLY by Donald H. Rumsfeld, Commander W.R. Paulette to response to [19-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/29/02	--	So Ordered: granting [26-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for Gregory George Garre to appear pro hac vice, fee waiver granted, entered and filed 7/29/02 (signed by Judge Robert G. Doumar) Copies Mailed: 7/29/02 (jcow)
7/30/02	29	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [25-1] motion to Dismiss by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/31/02	30	ORDER setting a hearing to hear argument on materials submitted, set Hearing Deadline for 2:00 8/8/02, further ordering the government to produce certain materials (see order for specifics) by noon on 8/6/02, entered and filed 7/31/02 (signed by Judge Robert G. Doumar) Copies Mailed: and faxed 7/31/02 [EOD Date: 7/31/02] (jcow)
8/1/02	31	Notice of supplemental authority filed by petitioner Yaser Esam Hamdi, petitioner Esam Fouad Hamdi (jcow)
8/5/02	32	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's production order of July 31, 2002 (jcow) [Entry date 08/06/02]
8/5/02	33	MEMORANDUM in support of [32-1] motion for relief from this court's production order of July 31, 2002 by Commander W.R. Paulette, Donald Rumsfeld, received (jcow) [Entry date 08/06/02]
8/7/02	34	ORDER that the hearing scheduled for 8/8/02 at 2:00pm is cancelled and suspending all proceedings in this case until the Court of Appeals has acted on the motion of the petitioner for relief from the stay, entered and filed 8/7/02 signed by Judge Robert G. Doumar) Copies Mailed: and faxed 8/7/02 [EOD Date: 8/7/02] (jcow)
8/8/02	35	Copy of USCA Order Dissolving the stay in order that the district court may proceed in strict compliance with our July 12, 2002 decision which directed the court to consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary; in accordance with the principles set forth in Hamdi v. Rumsfeld 2002 WL 1483908 (4th Cir. July 12, 2002

		the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further entered at the direction of Chief Judge Wilkinson with the concurrence of Judge Wilkins and Judge Traxler (jcow
8/9/02	36	Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld 7/12/02 (jcow
8/9/02	37	JUDGMENT OF USCA Reversing the District Court's June 11 order mandating access to counsel, REMANDING to the District Court for further proceedings consistent with the Court's opinion (certified copy) Re: [5-1] appeal filed (jcow)
8/9/02	38	ORDER setting this matter for a hearing on 8/13/02 at 11:00 a.m., for argument on the sufficiency of the Mobbs declaration, entered and filed 8/9/02 (signed by Judge Robert G. Doumar) Copies Mailed: 8/9/02 [EOD Date: 8/9/02] (vwar)
8/9/02	--	Hearing Deadline set at 11:00, on 8/13/02 before Judge Robert G. Doumar (vwar)
8/12/02	39	ORDER directing counsel to file an additional copy of pleadings, which are not in camera or under seal which copy the Clerk shall provide to the Court's contract copy service for access to the media and the public at the usual fee, the copy service telephone number is 757-533-9126, entered and filed 8/12/02 (signed by Judge Robert G.) Copies Mailed: 8/12/02 [EOD Date: 8/12/02] (vwar) [Edit date 08/12/02]
8/12/02	40	NOTICE of Supplemental Materials by Donald H. Rumsfeld, Commander W.R. Paulette (vwar)
8/13/02	41	Court Proceedings: RGD, USDJ, Penny Wile, OCR, Counsel appeared. Came on for hearing on the sufficiency of the Mobbs declaration. Arguments heard. Court takes matter under advisement. (bwin)
8/14/02	42	TRANSCRIPT OF PROCEEDINGS for dates of 8/13/02, before USDJ Doumar, Penny C. Wile, OCR (vwar)
8/16/02	43	ORDER denying [32-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's production order of July 31, 2002; directing the respondents to submit to the court the materials previously requested in the 7/31/02 order, together with the screening criteria utilized to determine the status of Hamdi with the names and addresses of the persons who made the determination; such sealed documents to be produced by 4:30 p. on 8/21/02 for the Judge's in camera review, entered and filed 8/16/02, (signed by Judge Robert G. Doumar, Copies Mailed: 8/16/02 [EOD Date: 8/16/02] (arlv
8/19/02	44	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for certification of interlocutory appeal and for stay (jcow) [Entry date 08/20/02]
8/20/02	45	Chambers Proceedings (Conference Call): RGD, USDJ, Penny Wile, OCR. Participants: Larry W. Shelton, Lawrence R. Leonard and Gergory G. Garre. Respondents' motion to extend time to submit materials to the court granted. Materials to be submitted to Judge Doumar's Chambers, under seal, by 12:00 p.m., 8/26/02. Petitioner to reply to respondents'

		motion for interlocutory appeal by 12:00 8/26 (bwin
8/20/02	46	ORDER that the petitioners file their brief, set Brief deadline to 10:00 8/21/02, Ordering the respondents to produce the documents outlined in the 8/16/02 production order, set Respond Deadline 12:00 8/26/02, or at such time as the court directs after the court decides the respondents' motion for certification of interlocutory appeal, entered and filed 8/20/02 signed by Judge Robert G. Doumar (Copies Mailed and faxed: 8/20/02 [EOD Date: 8/20/02] (jcow
8/21/02	47	Response by Yaser Esam Hamdi, Esam Fouad Hamdi to [44-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for Certification of Interlocutory Appeal and for Stay, received (vwar
8/21/02	48	TRANSCRIPT of TELEPHONIC CONFERENCE for dates of 8/20/02 before USDJ Robert G. Doumar, Penny C. Wile, OCR (vwar
8/21/02	49	ORDER certifying the question regarding the Mobbs Declaration, as outlined in the order, to the Fourth Circuit Court of Appeals and staying the deadline for compliance with its 8/16/02 production order until 5 days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question, entered and filed 8/21/02 , signed by Judge Robert G. Doumar (Copies Mailed: 8/21/02 [EOD Date: 8/21/02] (vwar
8/22/02	50	MOTION by Friends of Immigration to Intervene (vwar)
8/23/02	51	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [50-1] motion by Friends of Immigration to Intervene (arlv) [Entry date 08/26/02]
8/26/02	52	REPLY by Friends of Immigra. to response to [50-1, motion to Intervene, received, (vwar)
9/12/02	53	Copy of USCA Order granting respondents' petition for permission to appeal the district court's 8/16/02 order; respondents' opening brief is due 10/4/02, petitioners' answering brief is due by 10/18/02, respondents' reply brief is due 10/24/02 and oral argument is scheduled for 10/28/02 at 2:30 (jcow
9/18/02	54	RESPONSE in Opposition by Donald H. Rumsfeld, Commander W.R. Paulette to [50-1, motion by Friends of Immigration Law Enforcement to Intervene (jcow) [Entry date 09/19/02]

Case Flags:
APPEAL

END OF DOCKET: 2:02cv439

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUN 11 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD
Secretary of Defense
The Pentagon
Arlington, Va.,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig
8251 Ingersoll St.
Norfolk, Va. 23511-2699,

Respondents.

CASE NO. 2:02cv439

PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner Yaser Esam Hamdi, a citizen of the United States of America, is being held illegally, denied access to legal counsel, and denied access to the Court in violation of his constitutionally protected rights. Esam Fouad Hamdi, on behalf of his son, Yaser Esam Hamdi as his Next Friend, requests that this Court issue a Writ of Habeas Corpus.

PARTIES

2. Petitioner Yaser Esam Hamdi is an American citizen presently incarcerated and unlawfully

held by Respondents at the Norfolk Naval Station in Norfolk, Virginia. Mr. Hamdi was born in Baton Rouge, Louisiana, on September 26, 1980. *See* Exhibit A.

3. Petitioner Esam Fouad Hamdi is the father of Yaser Esam Hamdi. Esam Fouad Hamdi has had no contact with his son since Respondents gained custody of Yaser Esam Hamdi in 2001.

4. Respondent Paulette is a Commander in charge of the Norfolk Naval Brig. He is the custodian immediately responsible for the detention of Mr. Hamdi.

5. Respondent Rumsfeld is the United States Secretary of Defense and Respondent Paulette's superior.

JURISDICTION

6. Petitioners bring this action under 28 U.S.C. §§ 2241 and 2242, and invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; as well as under the Fifth and Fourteenth Amendments to the United States Constitution.

7. This Court is empowered under 28 U.S.C. § 2241 to grant the Writ of Habeas Corpus, and to entertain the Petition filed by Esam Fouad Hamdi, as Next Friend under 28 U.S.C. § 2242.

VENUE

8. Venue is proper in the United States District Court for the Eastern District of Virginia because the Petitioner's custodian resides in this district and the Petitioner is being held unlawfully in this district. 28 U.S.C. §§1391(b); 1391(e).

STATEMENT OF FACTS

9. Yaser Esam Hamdi is a citizen of the United States of America. When seized by the United States Government, Mr. Hamdi resided in Afghanistan.

Petitioner's Seizure By The United States

10. In the wake of September 11, 2001, the United States initiated military action against the Taliban Government in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("the Resolution") (attached as Exhibit B). The Resolution does not authorize the indefinite detention of persons seized on the field of battle.

11. In the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government.

12. In the course of its assistance to the Northern Alliance, the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001. Mr. Hamdi has been held in United States custody since that time without access to legal counsel or notice of any charges pending against him.

The Detention Order

13. On November 13, 2001, President George W. Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes Respondent Rumsfeld to detain "any individual who is *not a United States citizen*" that President George W. Bush has "reason to believe:"

> i. is or was a member of the organization known as al Qaida;
>
> ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

See Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (attached as Exhibit C). President George W. Bush must make this determination in writing.

14. On information and belief, President George W. Bush has never certified or determined in any manner, in writing or otherwise, that Yaser Esam Hamdi is subject to this detention order.

15. By its own terms, the Military Order does not authorize the detention of United States citizens. Accordingly, Yaser Esam Hamdi is not properly subject to this detention order.

Guantanamo Bay Naval Station

16. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. Approximately 7,000 military and civilian people reside in Guantanamo Bay under the complete jurisdiction and control of the United States.

17. On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay, where he was held until April 2002.

18. While held in Guantanamo Bay, the United States military denied Yaser Esam Hamdi access to legal representation or notice of the charges against him.

Norfolk Naval Brig

19. On or about April 6, 2002, Mr. Hamdi was transferred to a military jail at the Norfolk Naval Station in Norfolk, Virginia.

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20. To date, Yaser Esam Hamdi has not been charged with an offense, nor has he been notified of any pending or contemplated charges. Mr. Hamdi has made no appearance before either a military or civilian tribunal of any sort, nor has he been provided counsel or the means to contact counsel. On information and belief, Mr. Hamdi has not been informed of his rights under the United States Constitution. As a result, Mr. Hamdi is entirely unable to assert his constitutional rights to counsel or protection from unlawful detention.

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CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS - FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

21 Petitioners incorporate paragraphs 1-20 by reference.

22. As an American citizen, Yaser Esam Hamdi enjoys the full protections of the Constitution. *See Reid v. Covert*, 354 U.S. 1, 32-33 (1957) ("[The view that] constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him . . . is erroneous. The mere fact that [the defendants] had gone overseas . . . should not reduce the protection the Constitution gives them."); *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of citizen who was not a member of the United States armed forces).

23 By the actions described above, Respondents, acting under color of law, have violated and continue to violate the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] Clause protects. . . . And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate constitutional protections . . . .").

SECOND CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT)

24. Petitioners incorporate paragraphs 1-23 by reference.

25. To the extent the order of November 13, 2001, disallows any challenge to the legality of the Mr. Hamdi's detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

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PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. Grant Petitioner Esam Fouad Hamdi Next Friend status, as Next Friend of Yaser Esam Hamdi;
2. Appoint counsel to represent Yaser Esam Hamdi because he is indigent and has no funds with which to retain counsel in the United States;[1]
3. Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending;
4. Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution;
5. To the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations;
6. Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody;
7. Such other relief as the Court may deem necessary and appropriate to protect Petitioner Yaser Esam Hamdi's rights under the United States Constitution.

[1] See Exhibit D.

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Dated: June 8th 2002

Respectfully submitted,

Yaser Esam Hamdi, and Esam Fouad Hamdi,
as Next Friend of Yaser Esam Hamdi

Esam Fouad Hamdi
P.O. Box 240
Jubail, Saudi Arabia 31951

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VERIFICATION

KINGDOM OF SAUDI ARABIA
DISTRICT OF THE CONSULATE
SECTION OF THE CONSULATE
GENERAL OF THE UNITED STATES
OF AMERICA AT DHAHRAN } ss:
JUBAIL, SAUDI ARABIA

I, Esam Fouad Hamdi, next friend for Petitioner Yaser Esam Hamdi, being first duly sworn, state under pain and penalty of perjury that to the best of my knowledge and belief, the facts set forth in this Petition are true and correct.

Esam Fouad Hamdi

Subscribed and sworn to before me this 8th day of June, 2002
Appeared before me Esam Fouad Hamdi, only

Jason E. Bruder
Vice Consul
American Consulate General
Dhahran, Saudi Arabia

EXHIBIT A

EXHIBIT B

00000019

CERTIFICATE OF LIVE BIRTH

L 2048855

BIRTH NO 117-1980-058-00393

1A CHILD'S LAST NAME
HAMDI

1B FIRST NAME
YASER

1C SECOND NAME
ESAM

2A BIRTH DATE
SEPTEMBER 26, 1980

2B TIME OF BIRTH
4:05 PM

3 SEX
MALE

4 NUMBER BORN
SINGLE

5 BIRTH ORDER

6A PLACE OF BIRTH (CITY, TOWN, OR LOCATION)
BATON ROUGE

6B PARISH OF BIRTH
EAST BATON ROUGE

6C NAME OF HOSPITAL OR INSTITUTION
WOMAN'S HOSPITAL

7A RESIDENCE OF MOTHER (CITY, TOWN, OR LOCATION)
BATON ROUGE

7B PARISH
EAST BATON ROUGE

7C STATE
LOUISIANA

7D ZIP CODE
70809

7E STREET ADDRESS OF RESIDENCE
10448 JEFFERSON HIGHWAY APT E

8A FATHER'S LAST NAME
HAMDI

8B FIRST NAME
ESAM

8C SECOND NAME
FOUAD

8D CITY AND STATE OF BIRTH (IF NOT U.S., NAME OF COUNTRY)
MECCA, SAUDI ARABIA

8E AGE AT THIS BIRTH
25

9A MOTHER'S MAIDEN NAME
FATTAH

9B FIRST NAME
NADIAH

9C SECOND NAME
HUSSEN

9D CITY AND STATE OF BIRTH (IF NOT U.S., NAME OF COUNTRY)
TAIF, SAUDI ARABIA

9E AGE AT THIS BIRTH
21

FILE DATE
OCTOBER 22, 1980

DATE ISSUED
MAY 23, 2002

A REPRODUCTION OF THIS DOCUMENT IS VOID AND INVALID. DO NOT ACCEPT COPIES

THE ABOVE IS A TRUE CERTIFICATION OF NAME AND BIRTH FACTS ON FILE IN THE VITAL RECORDS REGISTRY OF THE STATE OF LOUISIANA PURSUANT TO LSA R.S.

00000018

UNITED STATES PUBLIC LAWS
107th Congress -- 1st Session
(c) 2001, LEXIS-NEXIS, A DIVISION OF REED ELSEVIER INC. AND REED ELSEVIER PROPERTIES INC.

PUBLIC LAW 107-40 [S.J. Res. 23]

SEPT. 18, 2001

107 P.L. 40; 115 Stat. 224; 2001 Enacted S.J. Res. 23; 107 Enacted S.J. Res. 23

BILL TRACKING REPORT: 107 Bill Tracking S.J. Res. 23
FULL TEXT VERSION(S) OF BILL: 107 S.J. Res. 23

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

[*2] SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.--

(1) Specific statutory authorization.-- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended

to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements.-- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

EXHIBIT C

LEXSEE 66 fed. reg. 57833

FEDERAL REGISTER

Vol. 66, No. 222

Presidential Documents

PRESIDENT OF THE UNITED STATES

Military Order of November 13, 2001

Title 3 -

The President

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

Part IV

66 FR 57833

ATE: Friday, November 16, 2001

To view the next page, type .np* TRANSMIT.
To view a specific page, transmit p* and the page number, e.g. p*1

[*57833]

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented

will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense [*57834] purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be -

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for- [*57835]

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to-

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order-

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or [*57836] proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

/s/ George W. Bush

THE WHITE HOUSE,

November 13, 2001.

[FR Doc. 01-28904 Filed 11-15-01; 8:56 am]

Billing code 3195-01-P

EXHIBIT D

AFFIDAVIT

Saturday, May 11, 2002

I, Esam Faoud Amin Hamdi, Saudi National and holder of passport number C025243, of P.O. Box 240, Jubail 31951, Saudi Arabia make oath and say as follows: My son Yaser Esam Hamdi, who is in a prison in the United States of America, has no assets whatsoever, with which he will be able to retain the services of a lawyer and also that I personally will be unable to provide funds for the legal services which my son will require.

Signature: (Esam Faoud Amin Hamdi)

ALI A. ALYAMI PASSPORT NO. C248734

Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUN 11 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

Currently before the Court is the matter of a third petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, filed on behalf of the Petitioner, Yaser Esam Hamdi, who is currently being held incommunicado in the brig of the naval base in Norfolk, Virginia.

The instant petition has been filed by Hamdi's father, Esam Fouad Hamdi, as next friend. The Supreme Court in Whitmore v. Arkansas, 495 U.S. 149 (1990), established a two prong test for whether someone is a proper next friend for purposes of filing a habeas corpus petition on behalf of a person in custody. "First, a 'next friend' must provide an adequate explanation--such as inaccessibility, mental incompetence, or other disability--why the real party in interest cannot appear on his own behalf to prosecute the action." Id. at 163. The reason why the real party in interest cannot appear on his own behalf in this case is obvious - Yaser Esam Hamdi is being held incommunicado on a military installation within the Eastern District of Virginia. The second prong

Jun-11-2002 17:19 CLERK US DIST COURT

requires that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate the action" and that dedication is generally shown by the next friend having "some significant relationship with the real party in interest." Id. The Petitioner's father, who has attempted for some months to arrange for his son to meet with an attorney, clearly qualifies under this standard. Therefore, having found that the Petitioner's father, Esam Fouad Hamdi, is a proper next friend of the Petitioner, the Court hereby **ORDERS** the petition filed.

The instant petition is the third filed on behalf of Hamdi. The prior two cases (2:02cv348 and 2:02cv382) have been consolidated because they arise out of the exact same circumstance, Hamdi's confinement, and involve the same parties, Hamdi and the United States government. For the same reason, the Court hereby **ORDERS** that those cases be consolidated with the instant case. It further appearing to the Court that the matters involved in this case are currently on appeal before the United States Court of Appeals for the Fourth Circuit, the Court **ORDERS** that this case be consolidated with those cases subject to the United States Court of Appeals for the Fourth Circuit allowing such consolidation.

Furthermore, it is appropriate to appoint counsel in this case, specifically the Federal Public Defender's Office. The petition includes an affidavit by Esam Fouad Hamdi that his son is without funds to retain his own counsel, and that the father is also unable to pay for an attorney for his son. The Court hereby finds that this affidavit is sufficient evidence of financial eligibility to warrant the appointment of counsel under 28 U.S.C. § 3006A. As to the identity of counsel, Frank Dunham and/or Larry Shelton of the Federal Public Defenders Office have both been appointed counsel for Hamdi in the already pending consolidated case, and given their familiarity with this case and their eagerness to proceed as Hamdi's attorneys, this Court sees no reason to appoint another counsel.

Therefore, this Court **ORDERS** that the Federal Public Defenders Office, and/or Frank Dunham and/or Larry Shelton be appointed counsel for the Petitioner.

In its Order of May 29, 2002, this Court Ordered the Respondents to Show Cause why a writ of habeas corpus should not be granted in this case, and set a date for the Respondents' answer and for a hearing on the matter. Because this case is now consolidated with the previous case in which that Order was issued, and since that Order was stayed, it would be appropriate to set a time when an answer should be filed. Accordingly, it is **ORDERED** that the Respondents answer this Order to Show Cause by 12:00 noon on June 17, 2002. As previously scheduled, the hearing to discuss these matters will be before this Court on June 20, 2002, at 2:00 p.m.

Furthermore, for the same reasons articulated in the May 29, 2002 Order, this Court hereby **ORDERS** that the Respondents allow either Frank Dunham or Larry Shelton from the Federal Public Defender's Office, as long as they possess the appropriate governmental security clearance, the opportunity to meet with Yaser Esam Hamdi within seventy-two hours of the entry of this Order or immediately following the elimination of any stay of this Order. Because it is represented to the Court that an interpreter will be needed for the attorney to communicate with Hamdi, an interpreter with the appropriate governmental security clearance will be allowed to attend the meeting. Finally, this meeting is to be private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way.

Finally, the Court **ORDERS** that this Order is stayed until 5:00 p.m. on Friday, June 14, 2002 to allow the Respondents an opportunity to appeal this Order, or if the United States Court of

Appeals for the Fourth Circuit allows the consolidation of this matter with the other pending cases until further Order of the Court of Appeals.

The Clerk of the Court is **DIRECTED** to forward copies of this Order, both by fax and by U.S. mail, to all counsel of record in the consolidated action, to Gregory Garre of the U.S Department of Justice, to the United States Court of Appeals for the Fourth Circuit, and to Yaser Esam Hamdi.

The Clerk is further **DIRECTED** to forward a copy of this Order to the United States Marshal for service of this Order upon the Respondents. The United States Marshal's office is hereby **DIRECTED** to serve this Order upon the Respondents.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next
Friend of Yaser Esam Hamdi,

Petitioners,

v. Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

RESPONDENTS' RESPONSE TO, AND MOTION TO DISMISS, THE PETITION FOR A WRIT OF HABEAS CORPUS

Respondents Donald Rumsfeld, Secretary of Defense, and Commander W.R. Paulette, Norfolk Naval Brig, by and through undersigned counsel, oppose and hereby move to dismiss the petition for a writ of habeas corpus in this case.

STATEMENT OF THE CASE

Background. On September 11, 2001, the al Qaida terrorist organization launched a large-scale, coordinated attack on the United States, killing approximately 3,000 persons, and specifically targeting the Headquarters of the Nation's Department of Defense. The President, pursuant to his constitutional authority as Commander in Chief, took immediate steps to prevent future attacks. Congress then authorized the President to use force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military

Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (attached as Exh. B to Petition for a Writ of Habeas Corpus (Pet.)). Congress further emphasized that the forces responsible for the September 11 attack pose an "unusual and extraordinary threat to the national security and foreign policy of the United States," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President, acting pursuant to his Commander in Chief authority and with express congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network. The ongoing military operations in Afghanistan – which are being conducted not only by thousands of men and women of the United States armed forces, but also by coalition forces of our international allies and members of the Northern Alliance and other local forces – have resulted, inter alia, in the destruction of al Qaida training camps, removal of the Taliban regime that supported al Qaida, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous members of the military forces sent to Afghanistan have lost their lives, and many others have suffered casualties as part of the campaign launched in the wake of September 11. See generally www.army.mil/enduringfreedom.

In the course of the military campaign – which remains active and ongoing – United States armed forces have captured or taken control of numerous individuals. Consistent with the settled laws and customs of war, and with the practice followed in virtually every other major armed conflict in the nation's history, the United States military has determined that many of the individuals captured in Afghanistan should be detained as enemy combatants. See Declaration of Michael H. Mobbs (Mobbs Decl.) (attached hereto). Such detention serves the vital objective of

preventing combatants from continuing to aid our enemies. In addition, detention of such combatants is critical to gathering intelligence in connection with the overall war effort, and especially with aiding military operations and preventing additional attacks on the United States or its allies.

The detainee in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He was seized as an enemy combatant and taken into control of the United States military in Afghanistan, after the Taliban unit that he was with surrendered to Northern Alliance forces in late 2001. See Mobbs Decl. ¶¶ 3-4. Applying screening criteria established by the United States military to determine which detainees seized in Afghanistan should continue to be detained, United States military authorities determined that Hamdi should be detained as an enemy combatant. Id. ¶ 6; see id. at ¶ 2, 7.[1] In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. Id. ¶ 5. Subsequent interviews with Hamdi also confirm his status as an enemy combatant. Indeed, Hamdi himself has stated that he laid down his assault rifle upon surrendering to Northern Alliance forces. Id. ¶ 9. Hamdi was transported by the United States military from Afghanistan to the Naval Base at Guantanamo Bay, Cuba, and was later transferred to the Naval Brig in Norfolk, Virginia. Id. ¶ 8.

2. This Habeas Action. On June 11, 2002, the detainee's father, Esam Fouad Hamdi, filed

[1] The screening criteria themselves are classified. Respondents can provide the Court further information about the criteria in a classified filing that would be submitted ex parte and under seal. However, review of the screening criteria is not necessary to the resolution of the petition in this case, which, the for reasons explained below, fails as a matter of law.

this habeas action "on behalf of his son * * * as his Next Friend." Pet. ¶ 1.[2] The petition alleges, inter alia, that the detainee, Hamdi, was residing in Afghanistan when he was taken into control of the United States military, and that Hamdi has been detained by the military since the fall of 2001 without being "charged with an offense" or "provided counsel." Id. ¶¶ 9, 19; see id. ¶ 12. The petition presents two challenges to the "[]awfulness of [Hamdi]'s detention." Id. at 6 (heading). First, the petition states that, "[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution," and that Hamdi's detention "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶¶ 22, 23. Second, the petition states that, "[t]o the extent that [the President's Order of November 13, 2001] disallows any challenge to the legality of [Hamdi's] detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ, in violation of Article I of the United States Constitution." Id. ¶ 25. The petition seeks Hamdi's release from custody and certain other relief. See id. at 7.

Before respondents had been served with the petition or had any notice of it, this Court ordered the petition filed, and ordered the appointment of the federal public defender as "counsel for the Petitioner." June 11, 2002 Order at 2-3. The Court furthered ordered respondents to allow the public defender to meet with the detainee in "private * * * without military personnel present." Id. at 3. Respondents appealed the June 11 Order and requested a stay pending appeal. On June 14, 2002, the court of appeals stayed the June 11 Order and "all proceedings before the district court in connection with this detainee until resolution of th[e] appeal." Order, Hamdi v. Rumsfeld, No.

[2] Two previous habeas petitions were filed on behalf of Hamdi. Following an appeal of the May 29, 2002 Order entered by this Court in those cases, see Hamdi v. Rumsfeld, 2002 WL 1369635 (4th Cir. June 26, 2002), those petitions were ordered dismissed by this Court.

02-6895 The court of appeals specified that "[a]ll stays shall remain in effect pending further order of the Court." Ibid. On July 12, 2002, the court of appeals issued an opinion reversing and remanding this Court's June 11 Order, "[b]ecause the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and allowing the United States even to respond." Hamdi v. Rumsfeld, 2002 WL 1483908, at 1.

On July 18, 2002, before issuance of the court of appeals' mandate in that appeal and before any order of the Fourth Circuit lifting the stay of "all proceedings" before this Court involving Hamdi, the Court ordered respondents, inter alia, to respond to the petition by noon on July 25, 2002. In addition, the Court ordered respondents to supply with their response answers to three issues not raised by the petition itself: (1) whether the detainee is being held "incommunicado" and, if he is not, "why * * * he can have visitors but not one of them be a lawyer," Tr. of July 18, 2002 Hrg. at 5; (2) whether the detainee is being held in "solitary confinement" and, if so, "would due process apply to him" on the basis of being so held, id. at 6; and (3) "with whom is [the United States] fighting," and "how would [the war] ever end if there is no government or organization with one can deal." ibid. This motion to dismiss is filed in response to the Court's July 18 Order.[3]

[3] Because the court of appeals' mandate has not yet issued, the court of appeals' stay of "all proceedings before the district court in connection with this detainee" remains in effect. See 4th Cir. Rule 8 ("An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court."). Accordingly, respondents continue to object to the effort of this Court to exercise jurisdiction over this action before issuance of the mandate. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995).

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ARGUMENT

THE PETITION SHOULD BE DISMISSED BECAUSE THE DETAINEE IS LAWFULLY DETAINED AS AN ENEMY COMBATANT

As the Fourth Circuit emphasized just weeks ago in this very case, this habeas action "arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." Hamdi v. Rumsfeld, 2002 WL 1483908, at *3; accord Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991). The petition challenges the authority of the Commander in Chief and the military to detain an enemy combatant captured in the theater of battle in a foreign land in connection with an ongoing military campaign. As the court of appeals held, the capture and detention of enemy combatants falls within the President's core war powers and, with respect to the present conflict, comes with the statutory authorization of Congress. See Hamdi, 2002 WL 1483908, at *3; id. at 5. Moreover, the court observed that "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and directed that "[a]ny judicial inquiry into [an individual]'s status as an alleged enemy combatant * * * must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at *5. Applying those "cardinal principles" (id. at *3) here compels the conclusion that the petition's challenge to the "[l]awfulness of [Hamdi's] detention" (Pet. at 6 (heading)) fails as a matter of law and, therefore, the petition should be dismissed by this Court without any further inquiry.

A. It Is Settled That The Military's Detention Of Enemy Combatants In Connection With Ongoing Hostilities, Including The Current Conflict, Is "Lawful"

The first claim raised by the petition in this case is that Hamdi is being detained in violation

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of the Constitution's due process guarantee. Pet. ¶¶ 21-23. That claim fails as a matter of law. The United States's authority to hold enemy combatants, including those with a claim to United States citizenship, is well-established and, indeed, in the wake of the recent appeal, is established law of the case in this action. Nothing in the Due Process Clause precludes such a detention. As the court of appeals has just held, "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 2002 WL 1483908, at *5 (emphasis added).

1. In so holding, the court of appeals drew upon a settled body of law recognizing that the United States military may seize and detain enemy combatants, or other belligerents, for the duration of a conflict. See Hamdi, 2002 WL 1483908, at *5. For example, in Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added and footnotes omitted), the Supreme Court stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

See id. at 31 n.8 (citing authorities); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913).[4]

[4] The practice of capturing and detaining enemy combatants is as old as war itself. See A. Rosas, The Legal Status of Prisoners of War 44-45 (1976). "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released." Territo, 156 F.2d at 146 (footnotes omitted). The capture and detention of enemy combatants also serves other vital military objectives, including the critical and age-old objective of obtaining intelligence from captured combatants to aid in the war effort. At the same time, once individuals are taken into control as enemy combatants, they are protected from harm or other reprisals, given medical care, and are treated humanely.

As the court of appeals recognized in this case, it also is settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See Hamdi, 2002 WL 1483908, at *5 (parenthetical discussing Quirin, 317 U.S. at 31, 37); see also Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."); Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957). To be sure, the fact that such a combatant has American citizenship may enable him to proceed with a habeas action that could not be brought by an alien combatant (cf. Johnson v. Eisentrager, 339 U.S. 763 (1950)), but it does not affect the Executive's settled authority to detain him as an enemy combatant.

The United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. As the court of appeals has recognized, "[t]he unconventional aspects of the present struggle do not make its stakes any less grave," and they do not, as the court further held, diminish the military's settled authority to capture and detain enemy combatants in connection with that conflict. Hamdi, 2002 WL 1483908, at *5.[5]

[5] As Quirin makes clear, the military's authority to capture and detain enemy combatants exists regardless of whether they are "lawful" or "unlawful" combatants under the laws and customs of war. Quirin, 317 U.S. at 30-31; see p. _, supra (quoting Quirin). In any event, the President has determined that al Qaida and the Taliban are unlawful combatants. See United

2 As an enemy combatant, the military's "present detention" of Hamdi is "lawful." Hamdi, 2002 WL 1483908, at *5, even though he has not been "charged with an offense" or "provided counsel." Pet. ¶ 19. There is no obligation under the laws and customs of war for captors to charge combatants with an offense (whether under the law of war or domestic law); indeed, a significant number, if not the vast majority, of those seized in war are never charged with any offense but instead are simply detained during the conflict. Similarly, there is no general right under the laws and customs of war for those detained as enemy combatants to be provided counsel. Even under the Third Geneva Convention – which does not afford protections to unlawful enemy combatants, such as the detainee here, see note 5, supra – prisoners of war have no right of access to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (GPW), Article 105.[6]

The Constitution does not supply any different guarantee. The Sixth Amendment by its terms applies only in the case of "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of any enemy combatant who – like most such combatants – has not been charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a

States v. Lindh, __ F.Supp.2d __, 2002 WL 1489373, at *8-*11 (E.D. Va. July 11, 2002). As noted above, Hamdi was captured as part of a Taliban unit. Mobbs Decl. ¶ 4.

[6] Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that general trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

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traditional civilian criminal trial."). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added). The only possible remaining source of a right to charges or counsel is the Due Process Clause.

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993); Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909); see also Colepaugh, 235 F.2d at 432; Ex parte Toscano, 208 F. at 943. As the Supreme Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." Moreover, if the Court were to consider the creation of some entirely new right under the Fifth Amendment in this case, the Court would have to balance the creation of such a right against the government's own interests, including the President's plenary authority as Commander in Chief and the important national security interests implicated by allowing access to counsel to enemy combatants. See, e.g., Middendorf, 425 U.S. at 42-43; id. at 45-46; id. at 49-51 (Powell, J., joined by Blackmun, J., concurring). Accordingly, even the most general due process analysis would not support a claim that Hamdi's "present detention" is unlawful because he has not been charged or provided counsel.[7]

[7] In addition, the Supreme Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); see also United States v. Gouveia, 467 U.S. 180 (1984) (no right to counsel during period of

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3 Similarly, nothing in 18 U.S.C. 4001 precludes Hamdi's detention as an enemy combatant. That provision – entitled "Limitation on detention; control of prisons" – states:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates, and provide for their rehabilitation, and reformation.

18 U.S.C. 4001. Although the petition does not mention Section 4001(a), petitioners raised it before the court of appeals and relied on it at oral argument before the Fourth Circuit. The court of appeals specifically inquired about Section 4001(a)'s application to this case, see Tr. of June 25, 2002 Arg. at 18-19, and yet reached the proper conclusion that Hamdi's "present detention" is "lawful" as long as he is properly classified as an enemy combatant. Hamdi, 2000 WL 1483908, at *5.

First, nothing in Section 4001 suggests that Congress sought to intrude upon the "long * * * established" authority of the Executive to capture and detain enemy combatants in war time. Hamdi, 2000 WL 1483908, at *5; see id. at *3 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). To the contrary, Section 4001 by its terms is addressed to the control of civilian prisons and related detentions. Indeed, subsection (b) explicitly addresses the "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b).

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administrative detention).

Subsection (a), the provision cited by petitioners in the court of appeals, cannot be read without reference to the immediately surrounding text. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"); accord Tyler v. Cain, 533 U.S. 656, 662-663 (2001); Jones v. United States, 527 U.S. 373, 388 (1999). And, particularly when the provision is read as a whole, there is no basis for concluding that Section 4001 was in any way addressed to the military's detention of enemy combatants.

Second, even if Section 4001 were susceptible to a different interpretation, this Court's duty would be to adopt the facially reasonable – if not textually compelled – interpretation that Section 4001 is addressed to civilian rather than military detentions. As the Supreme Court has held, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Jones v. United States, 529 U.S. 848, 857 (2000); accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, 485 U.S. 568, 575 (1988). The longstanding canon of constitutional avoidance independently forecloses any interpretation of Section 4001(a) that would extend it to interfere with the longstanding authority of the President as Commander in Chief and the armed forces to detain enemy combatants during war time. Petitioners' proposed reading of Section 4001(a) would directly interfere with the President's ability to detain an enemy combatant who claims citizenship. That situation arose in World War II, see Quirin, supra; Terlo, supra, and has now arisen again. A Court should not infer that a provision that is explicitly addressed to civilian detentions meant to override that long-established and vital war time authority of the Executive.

Third, and in any event, the detention at issue is authorized by at least two different Acts of Congress. First, as the court of appeals specifically noted (Hamdi, 2000 WL 1483908, at *3, *5), the challenged Executive actions in this case fall within Congress's express statutory authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11 terrorist attacks." Hamdi, 2002 WL 1483908, at *5 (quoting 115 Stat. 224; emphasis added by court of appeals). Second, Congress has appropriated funding to the Department of Defense to pay for the expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (appropriating funding for the "issue of authorized articles to prisoners and other persons in military custody"). By explicitly funding the detention of "prisoners of war" and persons – such as enemy combatants – "similar to prisoners of war" Congress has plainly authorized the military detention of such combatants. Therefore, Section 4001(a) does not in any way bar the military detention of enemy combatants such as Hamdi.

In sum, as long as Hamdi "is indeed an 'enemy combatant,'" then – as the Fourth Circuit already has established in this case – his "present detention" is "lawful." Hamdi, 2000 WL 1483908, at *5. Because the petition itself does not challenge the military's determination that Hamdi is an enemy combatant, but instead raises legal challenges that were considered and rejected, inter alia, by the Supreme Court in Quirin, petitioners' due process claims fails on its own terms. In any event, as explained in Part C, infra, even if the petition had challenged Hamdi's enemy combatant status (or if petitioners attempt to do so now), the military has properly determined that Hamdi is an enemy combatant and, as a matter of law, that determination satisfies any appropriate standard of review.

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B. The President's Order Of November 13, 2001 Is Not Applicable To Hamdi And Has Not Resulted In Any Suspension Of The Writ

In addition to the alleged violation of due process, the only other claim raised by the petition is the legal claim that, to the extent that the President's Military Order of November 13, 2001 (see Pet., Exh. C) forecloses judicial review of Hamdi's detention via habeas, "the Order and its enforcement constitute an unlawful suspension of the Writ." Pet. ¶ 25. That claim, too, fails as a matter of law. By its terms, the President's November 13, 2001 Order applies only to non-citizens whom the President determines "in writing" to be subject to his Order. See Military Order § 2(a). The President has made no such written determination with respect to Hamdi, who is alleged to be an American citizen. Therefore, the President's Military Order has absolutely no application to Hamdi in his present situation. That is a sufficient basis to reject the petition's second claim as a matter of law. But in any event, the very fact of this habeas proceeding underscores that there has been no "Suspension of the Writ." Pet. ¶ 25. The writ of habeas corpus remains available to individuals, such as Hamdi, who are detained as enemy combatants to challenge the legality of their detention. Petitioners' challenges to Hamdi's detention as inconsistent with the Due Process Clause and 18 U.S.C. 4001(a) fail for the reasons explained above, but they involve a classic use of the writ to challenge the legality of detention, just as, for example, the Quirin petitioners employed the writ to raise similar – and similarly unavailing – claims.

C. As A Matter Of Law, The Military Has Properly Determined That Hamdi

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Should Be Detained As An Enemy Combatant

Although the petition does not specifically challenge the military's determination that Hamdi is an enemy combatant, it is clear that such determination is proper and, as a matter of law, is entitled to be given effect by the courts under any appropriate standard of review.

1. The Fourth Circuit already has made clear in this case that the tremendous deference owed to the political branches in matters involving foreign relations and national security "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Hamdi, 2002 WL 1483908 at *3 (emphasis added). The court further emphasized that "the standard for reviewing the government's designation of Hamdi as an enemy combatant" is shaped by "[s]eparation of powers principles," and "must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, from additional unprovoked attack." Id. at *5.

Indeed, the Executive's determination that someone is an enemy combatant and should be detained as such is one of the most fundamental military judgments of all. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come * * * are matters of political judgment for which judges have neither technical competence nor official responsibility"); Eisentrager, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the

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Commander-in-Chief in sending our armed forces abroad or to any particular region." And the Judiciary, as the Fourth Circuit has recognized, lacks institutional competence in making such military judgments. See Hamdi, 2002 WL 1483908 at *5 ("The executive is best prepared to exercise the military judgment attending the capture of alleged combatants."); see also Thomasson, 80 F.3d at 926 ("[T]he lack of competence on the part of the courts [with respect to military judgments] is marked) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); Tiffany, 931 F.2d at 278.

2. The sworn declaration appended hereto explaining the military's determination that Hamdi is an enemy combatant readily satisfies any constitutionally appropriate standard of judicial review in this extremely sensitive and important realm of Executive decisionmaking. Proper respect for separation of powers and the appropriate division of responsibilities between the judicial and executive branches may well limit the courts to the consideration of legal attacks on detention of the type considered in Quirin and Territo (and raised by petitioners here and discussed in Parts A and B, supra). At most, however, in light of fundamental separations of powers concerns, a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that the detainee is an enemy combatant. This return and the accompanying declaration more than satisfy that standard of review.

Indeed, in evaluating habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call upon the Executive only to show "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole

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means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. United States, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The focus of the inquiry is thus the Executive's determination, and the court's role is limited to confirming that there was a basis for that determination, and not to undertake a de novo determination for itself.

Mover v. Peabody, 212 U.S. 78 (1909), is also instructive in this connection. There, the Court considered the due process challenge of a person who had been detained without probable cause for months by the governor of Colorado acting in his capacity of "commander-in-chief of the state forces" during a local "state of insurrection." Id. at 82. In rejecting that challenge, Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had

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not reasonable ground for his belief." Id. at 85; see also United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.") (citing Mover); United States v. Chalk, 441 F.2d 1277, 1282 (4th Cir.) ("It is enough, we think, that there was a factual basis for the mayor's decision to proclaim the existence of a state of emergency and that he acted in good faith.") (citing Mover), cert. denied, 404 U.S. 943 (1971).[8]

The basic considerations underlying the limited scope of judicial review of the sorts of executive determinations underlying the foregoing cases are only magnified in a case such as this, involving a challenge to the military's determination that someone seized in the middle of active hostilities in a foreign land is an enemy combatant. And so too, at a bare minimum, the military's determination that an individual is an enemy combatant should be respected by the courts as long as the military shows some evidence for that determination. Any more demanding standard would

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[8] Judicial deference to executive branch determinations is hardly unique. For example, in suits brought under the Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., to challenge executive agency actions, the standard of judicial review is "a narrow, highly deferential one," see, e.g., Bagdonas v. Department of Treasury, 93 F.3d 422, 425 (7th Cir. 1996) (citing 5 U.S.C. S 706(2)(A)), bordering on a presumption that the action taken is valid, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds, 430 U.S. 99, 97 S. Ct. 980 (1977); accord Comsat Corp. v. National Science Foundation, 190 F.3d 269, 278 (4th Cir. 1999) (in APA cases, courts "defer to the agency's judgment, recognizing * * * that federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do * * * [because] [o]ur Constitution vests such responsibilities in the political branches.") (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984)). The APA standard of review does not permit a reviewing court to "substitute [its] judgment for that of the agency." See, e.g., Hearrwood, 230 F.3d 947, 953 (7th Cir. 2000). Instead, the court must affirm the action if the agency's "decision was supported by a 'rational basis.'" Bagdonas, 93 F.3d at 425-26. Although the standard of review appropriate with respect to the type of military determination at issue in this case is far more deferential than anything under the APA, the APA example underscores the typically hands-off approach of the Judiciary when it comes to reviewing executive decisionmaking.

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disregard the compelling separations of powers concerns recognized by the court of appeals in this case and unnecessarily invite the "special hazards of judicial involvement in military decision-making" foreseen by the court of appeals. As the Fourth Circuit recognized, "allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Article I and II on their heads." Hamdi, 2000 WL 1483908, at *6. At the same time, applying a heightened standard would risk "a conflict between judicial and military opinion highly comforting to enemies of the United States." Eisentrager, 339 U.S. at 779.

Respondents here have provided a more than ample factual basis to support the military's determination that the detainee in this case is an enemy combatant. The Mobbs Declaration explains the relevant events surrounding Hamdi's capture and detention. In particular, the declaration explains that: Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; he remained with the Taliban after September 11, 2001, and after the United States military campaign began in Afghanistan in October 2001; and he was captured when his Taliban unit surrendered to – and, indeed, laid down arms to – Northern Alliances forces. Mobbs Decl. ¶¶ 3-5, 9.[9] The declaration further explains that the military determined that Hamdi should be detained as an enemy combatant based on interrogations with Hamdi in which Hamdi himself stated that he went to Afghanistan to train with the Taliban and that he turned over his assault rifle to Northern Alliance

[9] The fact that Hamdi was undisputably seized in the midst of hostile territory occupied by al Qaida and Taliban is itself significant. See Pet. ¶ 9 ("Hamdi resided in Afghanistan" when he was seized.); cf. Miller v. United States, 78 U.S. 268, 310-311 (1870) (In the context of determining rights to confiscated property, Court stated "[i]t is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); Lamar, Executor v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies.").

forces. Id. ¶¶ 5, 9. The Mobbs Declaration amply supports the military's determination that Hamdi is an enemy combatant and, therefore, that Hamdi is being lawfully detained as such.

3. No further factual development or evidentiary proceedings are necessary to dispose of the petition. Under the deferential inquiry discussed above, a court's role is limited to evaluating whether the Executive has shown some factual basis for its decision. A court is not to review, or to second-guess, the particular facts relied upon the Executive in making its decision. In particular, in the context in which this case arises, there is no basis for a court to conduct evidentiary proceedings with respect to any of the particular facts or circumstances surrounding an individual's capture as an enemy combatant, effectively opening the door for "alleged enemy combatants to call American commanders to account in federal court rooms." Hamdi, 2000 WL 1483908, at *5. The Court's proper role does not permit it to call members of the United States military back from the front, or to somehow attempt to bring into the courtroom the Northern Alliance forces who accepted Hamdi's surrender. Nor would it be proper to call Hamdi himself to court and, thus, seriously jeopardize important national security interests related to intelligence gathering. There is no need for an attempt at recreation or de novo examination of the circumstances surrounding Hamdi's capture on a foreign battlefield. The relevant issue is whether the United States military had a factual basis for treating Hamdi as an enemy combatant. This return and the accompanying declaration readily demonstrate that the military had such a basis, and that is the end of the inquiry.

Similarly, because the exclusive focus is on whether the military had a factual basis for its determination, there is no need for an attorney to have access to a detained enemy combatant to see if the detainee disputes any of the facts relied upon by the military. That conclusion is bolstered further by the urgent national interests that would be jeopardized by allowing attorneys to have

access to detained enemy combatants. First, such access would directly interfere with – and likely thwart – efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters. Such intelligence is critical to the successful prosecution of any war effort and, in the present conflict, in all likelihood already has avoided additional harm to American lives or interests on the home front. Second, such access may enable detained enemy combatants to pass concealed messages to the enemy about military detention facilities, the security at such facilities, or other military operations – something that members (and presumably supporters) of al Qaida are trained to do. See Al Qaida Manual, www.usdoj.gov:80/ag/trainingmanual.htm.

Collecting and assessing intelligence is one of the most important duties of the Commander in Chief, especially in wartime. See United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.) ("[g]athering intelligence information" is "within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces"), cert. denied, 409 U.S. 1063 (1972); see also Snepp v. United States, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."). Especially when there is no need whatever for such access to dispose as a matter of law of a habeas petition such as this, a court should refuse to overstep the fundamental separation of powers principles discussed above and jeopardize vital national security interests in intelligence gathering.

D. Response To This Court's Own Queries Of July 18, 2002

On July 18, 2002, this Court ordered respondents to include in their response to the petition answers to three questions listed below that are not raised in the petition. See Tr. of July 18, 2002 Hrg. at 5-7; see id. at 7 (The answers to the Court's questions "will be provided in the answer that

the government is to file to the petition."). That sua sponte request for information relevant to theories not raised by the petition is difficult to square with the restraint typically exercised by the courts in reviewing challenges, such as this case, arising "in the context of foreign relations and national security." Hamdi, 2000 WL 1483908, at *3; see id. at *6 ("Our Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step."). In addition, this Court's own queries cannot alter the claims presented by the petition giving rise to this case. In any event, as explained below, the answers to the Court's inquiries further confirm that Hamdi is being lawfully detained as an enemy combatant.

1. The Court inquired "why * * * if [Hamdi] is possibly an American citizen, he can have visitors but not one of them be a lawyer." Tr. of July 18, 2002 Hrg. at 5. That query was addressed to press reports indicating "that all of the United States citizens who were being held or those people who may have had United States citizenship were not held incommunicado, according to press reports, and were having visitors." Ibid. A recent article in The Virginia Pilot reported on a panel discussion at a state bar association meeting. See C. Kahn, Federal Prosecutors Defend Handling of Terrorism Suspects, The Virginia Pilot (July 14, 2002). The comments to which the Court presumably referred appeared to have been directed to individuals held pursuant to criminal charges, material witness warrants, or immigration violations, and not those held as enemy combatants.[10]

Individuals who are detained by the military as enemy combatants, including Hamdi, are allowed only official contacts – i.e., government and military officials and representatives from the

[10] Although Mr. McNulty, United States Attorney for the Eastern District of Virginia, spoke at the state bar association meeting reported by the article, the comments to which the Court appears to have been referring were made by another Department of Justice official, as the article indicates.

International Committee of the Red Cross. No other visitors are allowed. As discussed above, the military has generally determined that allowing other visitors – including lawyers – to have access to detained enemy combatants would jeopardize national security interests by interfering with ongoing intelligence gathering efforts and possibly allowing detainees to pass concealed messages about, inter alia, the security in the facilities where they have been detained. See p. 20, supra. Detained enemy combatants are permitted to send and receive mail to and from family members. Due to national and institutional security concerns, all mail is screened.

2. The Court inquired whether, if Hamdi is being held in "solitary confinement," "would due process apply to him." Tr. of July 18, 2002 Hrg. at 6. As discussed above, the Fourth Circuit has held that Hamdi's "present detention" is "lawful" as long as he is an enemy combatant. Hamdi, 2000 WL 1483908, at *5. Presently, Hamdi is not being held in solitary confinement, as that term is normally understood. He is, however, the only enemy combatant detained in the Norfolk Naval Brig and, pursuant to 10 U.S.C. 812, is not confined in "immediate association" with members of the United States armed forces. There is no factual dispute about this, but any legal challenge to the conditions of Hamdi's confinement would fail as a matter of law. The military's decision to separate Hamdi from any others at the Norfolk Naval Brig does not trigger any additional layer of due process review. Determinations about the appropriate conditions of confinement for an individual properly held as an enemy combatant are committed to the military. Even if Hamdi were subject to the same due process protections applicable to typical prison inmates, however, no due process violation would result from separating him from the main prison population (or in limiting his visitation) when, as here, the reasons for those restrictions are related to obviously legitimate security and

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prison management concerns.[11] A fortiori, those types of conditions would not raise any different or meritorious, due process claim with respect to the type of sensitive military detention at issue here.

3. Finally, the Court inquired about the unconventional aspects of the present conflict. See Tr. of July 18, 2002 Hrg. at 7 ("[W]ith whom is [the United States] fighting," and "how would [the war] ever end if there is no government or organization with one can deal."). The fighting in Afghanistan has focused on al Qiada and the Taliban, but, as Congress's Joint Resolution Authorizing the Use of Military Force underscores, the current conflict at a minimum involves the "nations, organizations, or persons he [i.e., the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." 115 Stat. 224. With respect to when the conflict will end, the key point is that there is no dispute that the United States is presently engaged in active hostilities. As a result, even if cessation of hostilities and the continued need to detain enemy combatants were matters for judicial inquiry, the concern that hostilities might persist indefinitely is clearly premature here.

More generally, the Supreme Court has expressly recognized that questions concerning the

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[11] Even in the civilian prison context, courts have afforded prison officials broad latitude to restrict visitation rights of both convicted inmates and pretrial detainees. See Block v. Rutherford, 468 U.S. 576, 585-589 (1984); Bell v. Procunier, 417 U.S. 817, 822-828 (1974). Even for pretrial detainees, who have not been convicted of any crime, prison officials are afforded great deference to impose restrictions, as long as they are reasonably related to a legitimate security concern. Bell v. Wolfish, 441 U.S. 520, 536-540 (1979). The same is true for segregation from other prisoners, as long as the segregation is not for punitive reasons, but merely for administrative or security concerns, as is true here. Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002) (pretrial detainees have no due process right to avoid administrative segregation), citing Bell v. Wolfish, 441 U.S. 520 (1979); Sandin v. Conner, 515 U.S. 472, 485 (1995) (30-day disciplinary segregation of convicted prisoner not subject to due process where it was not a "dramatic departure from the basic conditions of [the prisoner's] * * * sentence").

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cessation of hostilities or the scope of armed conflict are committed to the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (Whether a state of "war" exists is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility."); United States v. The Three Friends, 166 U.S. 1, 63 (1887) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted."); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President * * * has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department"). The unconventional nature of the war in which the Nation is currently engaged only heightens the need for judicial deference to the determination of the political branches with respect to such judgments.

In any event, as the Fourth Circuit has recognized – and as the savage attack of September 11 underscores – "[t]he unconventional aspects of the present struggle do not make its stakes any less grave." Hamdi, 2000 WL 1483908, at *5. Nor, as the Fourth Circuit's recent decision also makes clear, does the unconventional nature of the conflict in any way diminish the military's "established" authority lawfully to detain Hamdi as an enemy combatant. See ibid.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: _____
Lawrence R. Leonard
Managing Assistant United States Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, Virginia 23510
(757) 441-6331

Paul D. Clement
Deputy Solicitor General
Alice S. Fisher
Deputy Assistant Attorney General

By: _____
Gregory G. Garre
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Attorneys for Respondents

Dated: July 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Respondents' Response to and Motion to Dismiss the Petition for Writ of Habeas Corpus was served, this 25th day of July, 2002, by hand delivery addressed to:

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

Lawrence R. Leonard
Managing Assistant United States Attorney

Declaration of Michael H. Mobbs
Special Advisor to the Under Secretary of Defense for Policy

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a Special Advisor to the Under Secretary of Defense for Policy. In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban). I have been involved with detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

2. I am familiar with Department of Defense, U.S. Central Command and U.S. land forces commander policies and procedures applicable to the detention, control and transfer of al Qaeda or Taliban personnel in Afghanistan during the relevant period. Based upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of Yaser Esam Hamdi and his detention by U.S. military forces.

3. Yaser Esam Hamdi traveled to Afghanistan in approximately July or August of 2001. He affiliated with a Taliban military unit and received weapons training. Hamdi remained with his Taliban unit following the attacks of September 11 and after the United States began military operations against the al Qaeda and Taliban on October 7, 2001.

4. In late 2001, Northern Alliance forces were engaged in battle with the Taliban. During this time, Hamdi's Taliban unit surrendered to Northern Alliance forces and he was transported with his unit from Konduz, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of the Northern Alliance forces. Hamdi was directed to surrender his Kalishnikov assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so. After a prison uprising, the Northern Alliance transferred Hamdi to a prison at Sneberghan, Afghanistan, which was also under the control of Northern Alliance forces.

5. While in the Northern Alliance prison at Sheberghan, Hamdi was interviewed by a U.S. interrogation team. He identified himself as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. Hamdi spoke English.

EXHIBIT
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6. Al Qaeda and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al Qaeda or Taliban were and continue to be enemy combatants. Based upon his interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant.

7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control. Based on an order of the U.S. land forces commander, a group of detainees, including Hamdi, was transferred from the Northern Alliance-controlled Sheberghan prison to the U.S. short-term detention facility in Kandahar. Hamdi was in-processed and screened by U.S. forces at the Kandahar facility.

8. In January 2002, a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay.

9. A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant.

MICHAEL H. MOBBS
Special Advisor to the
Under Secretary of Defense for Policy

Dated: 24 July 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITIONER'S TRAVERSE AND RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Introduction

Respondents' arguments pose a grave threat to the constitutional rights of American citizens. Under the guise of the President's power to act as Commander in Chief of the armed forces, Respondents seek to strip from those they label as "enemy combatants" the protections ordinarily afforded to all citizens under the Bill of Rights of the Constitution. In Petitioner Hamdi's case, Respondents propose to do this on the basis of a sparse factual statement which raises more questions than it answers. *See* (Respondents' Response To, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, Ex. 1) ("Resp."). Respondents even contend that there is no need for "further factual development or evidentiary proceedings . . . to dispose of this case." (Resp. at 20).

Respondents' argument is no different from the "sweeping proposition" criticized by the

Court of Appeals for the Fourth Circuit: "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002). Here, Respondents rely upon the "say-so" of a lawyer, Michael H. Mobbs, who has no personal knowledge related to Petitioner Hamdi. And Respondents refuse to permit Petitioner Hamdi to reveal his account of his capture and detention. Aside from the inequity inherent in these circumstances, the position advanced by Respondents also would eliminate basic liberties required under the Constitution for all citizens: the right not to be detained indefinitely without due process, and the right not to be punished without due process.

The Mobbs Declaration is so inadequate on its face that this Court should grant a writ of habeas corpus on the basis of the record as its stands. Nonetheless, to the extent that the Court finds that the facts set forth in the Mobbs Declaration are sufficient to deny the issuance of a writ, Petitioner Hamdi must be permitted an opportunity to confront those facts and traverse them if he can.

As for the legal issues presented by this case, Respondents mischaracterize the breadth of Petitioner Hamdi's claims. Respondents contend that the underlying Petition raises a "challenge to the authority of the Commander in Chief and the military to detain an enemy combatant captured in the theater of battle in a foreign land in connection with an ongoing military campaign." (Resp. at 6). This hyperbole states a far broader proposition than the issue presented by Petitioner Hamdi.

The claims asserted by Petitioner Hamdi–an individual that Respondents do not dispute is an American citizen–pose no risk to the ability of the Executive Branch to prosecute military actions overseas. Indeed, Petitioner Hamdi's claim that he cannot be held indefinitely or punished without due process is not one that can be made by enemy aliens overseas. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Nor does this claim implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan. Petitioner Hamdi challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia. In other words, Petitioner Hamdi's claims have no practical

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consequences for the conduct of the military overseas.

The relation between the Executive's conduct of military affairs and the continued indefinite detention of Petitioner Hamdi is relevant to the degree of deference to be afforded the Executive branch by this Court. Respondents mistakenly contend that deference to the President in his conduct of military affairs is unbridled, and that the circumstances at issue have no bearing on the measure of deference given to Executive conduct. But the deference invoked by Respondents is greatest when applied to the conduct of "military commanders engaged in day-to-day fighting in a theater of war," and much less forgiving when the President purports to exercise his power as Commander in Chief at home. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Petitioner Hamdi is unable to object to Respondents' meager factual submission, including statements allegedly obtained from Petitioner Hamdi himself, because Respondents refuse to permit access to his appointed counsel. Nonetheless, the record is sufficient for this Court to: (1) conclude that Petitioner Hamdi must be released even if Respondents' characterization of his status as an "enemy combatant" is entirely accurate; (2) order Respondents to provide additional factual material in support of their decision to imprison Petitioner Hamdi.[1]

Procedural History

I. **Petition Filed on June 11, 2002**

On June 11, 2002, the underlying Petition for Writ of Habeas Corpus was filed on behalf of Yaser Esam Hamdi by his father as next friend. The Petition alleges that Petitioner Yaser Hamdi is a United States citizen, that he is being held by Respondents, and that he has not been charged with any criminal offense.

The same day that the Petition was filed, the Court entered an Order consolidating this action with the two previous actions filed on behalf of Yaser Esam Hamdi. The Court also found as a

[1] Petitioner in no way concedes that Respondents' factual assertions are true. For example, information about Petitioner Hamdi prior to his transfer to the custody of Respondents is based on the hearsay of unknown members of the Northern Alliance.

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factual matter that the Petition for Writ of Habeas Corpus was properly filed on behalf of Petitioner Yaser Hamdi pursuant to *Whitmore v. Arkansas*, 495 U.S. 149 (1990), and appointed counsel to represent him under 18 U.S.C. § 3006A. Finally, after having heard substantial argument on this issue in the prior case, the Court ordered Respondents to file an Answer by 12:00 noon on June 17, 2002, and directed that: "Respondents allow either Frank Dunham or Larry Shelton from the Federal Public Defender's Office, as long as they possess the appropriate governmental security clearance, the opportunity to meet with Yaser Esam Hamdi within seventy-two hours of the entry of this Order or immediately following the elimination of any stay of this Order."

II. Interlocutory Appeal of the Court's June 11, 2002, Order

On June 13, 2002, Respondents filed a Notice of Appeal, an Emergency Motion for Temporary Stay Pending Consideration of Motion for Stay Pending Appeal, and an Emergency Motion for Stay Pending Appeal. The Court of Appeals for the Fourth Circuit granted Respondents' Emergency Motion for Temporary Stay, and directed Petitioners to file a Response to the Emergency Motion for Stay no later than 2:00 p.m. on June 14, 2002.

Petitioners filed their Response to Appellants' Emergency Motion within the specified time on June 14, 2002, and the Fourth Circuit granted Respondents' motion several hours later. In its June 14, 2002, Order, the court of appeals stayed "all proceedings before the district court in connection with this detainee" and set forth an expedited briefing schedule. Specifically, the Fourth Circuit directed Respondents to submit their brief on the merits by 12:00 noon on Wednesday, June 19, 2002, and permitted Petitioners to file a Response brief within twenty-four hours thereafter.

On July 12, 2002, the court of appeals issued an opinion reversing this Court's June 11, 2002, Order. Specifically, the court of appeals reversed the June 11, 2002, Order insofar as it required "access to counsel" and remanded the case for further proceedings. On July 18, 2002, this Court

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entered an order setting forth a briefing and discovery schedule.[2]

Factual Conclusions

The Petition for Writ of Habeas Corpus alleges that Petitioner Hamdi is an American citizen who was born in Baton Rouge, Louisiana, on September 26, 1980. (Pet'n ¶¶ 2, 9.) Respondents do not deny that Petitioner Hamdi is an American citizen.

A. Afghanistan

1. Petitioner Hamdi is Not a Member of al-Qaida, and is not a Terrorist

According to both the Petition and the Mobbs Declaration, Petitioner Hamdi was captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001, and "has been held in United States custody since that time without access to legal counsel or notice of any charges pending against him." (Pet'n ¶ 12.) In addition, according to the account of Petitioner Hamdi's conduct from the Mobbs Declaration, Petitioner Hamdi was with a unit of Taliban soldiers when he was captured. Mobbs ¶ 4. In other words, Respondents make no claim that Mr. Hamdi belonged to al-Qaida or any terrorist organization. Based on the record before it, the Court therefore can conclude that Petitioner Hamdi is not a member of al-Qaida, and is not a member of a terrorist organization.

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[2] Even though the Fourth Circuit has yet to issue its mandate, the absence of the mandate itself does not preclude this Court from addressing issues unrelated to the access question before the court of appeals. *See* (Pet. Resp. Refusal to File Rule 26 Disclosures at 2-3).

Respondents also object that the Fourth Circuit entered a stay of all proceedings pending the interlocutory appeal in this case. (Resp. at 5 n.3). Respondents have also cited Appellate Local Rule 8, which provides: "An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court." 4th Cir. Local Rule 8.

Appellate Local Rule 8 acknowledges that a stay may dissolve upon "further order of the Court," and the Fourth Circuit's July 12, 2002, opinion may constitute such an order. Nonetheless, should this Court express concern that the Fourth Circuit's stay remains in effect, Petitioner is prepared to request that the Fourth Circuit issue an order that explicitly dissolves the stay entered on June 14, 2002.

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2. The War with the Taliban Is Over

The Court requested Respondents to explain "with whom is the belligerent action taken . . . . And . . . how would it ever end?" July 18 Tr. at 6. To determine whether the armed conflict with the Taliban has concluded, the Court must "refer to some public act of the political departments of the government to fix the dates." *The Protector*, 79 U.S. 700, 702 (1871); *see also Ludecke v. Watkins*, 335 U.S. 160, 170 (1948); *The Prize Cases*, 67 U.S. 635, 670 (1862). On December 22, 2001, the United States recognized the newly installed government in Afghanistan. Amy Waldman, *New Leaders Set to Assume Power in Tranquil Kabul*, N.Y. Times, Dec. 22, 2001, at A1. The President also has recognized the change in regimes in both a Proclamation and a proposed regulation. *See* Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002).

Most importantly, the President has terminated the national emergency declared to deal with the Taliban. *See* 64 Fed. Reg. 36759 (July 4, 1999). Pursuant to Executive Order 13268 of July 2, 2002, the President found that "the situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban . . . has been significantly altered given the success of the military campaign in Afghanistan." 67 Fed. Reg. 44751. The President therefore "revoke[d] that order and terminate[d] the national emergency declared in that order with respect to the Taliban." *Id.*

The Executive branch has determined that the armed conflict with the Taliban has concluded. *Cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them . . . ."). Consequently, even if the Court accepts the facts as reflected in the Mobbs Declaration, Petitioner Hamdi is entitled to immediate release.

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B. Detention in the Naval Brig in Norfolk

In January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba. (Pet'n ¶ 17.) In April 2002, Respondents moved Petitioner Hamdi again, this time to a military jail at the Norfolk Naval Station in Norfolk, Virginia. (Id. ¶ 19.) Respondents have not charged Petitioner Hamdi with any crime, and continue to deny him the means to contact counsel or challenge the legality of his detention. (Id.)

1. Petitioner Hamdi's Transfer to Norfolk, Virginia, Is Consistent With Criminal Proceedings Rather than Detention of Enemy Combatants

Absent from Respondents' Response is any explanation as to why Petitioner was moved from Guantanamo Bay, Cuba, where he was initially housed with other persons taken into custody by the U.S. military in Afghanistan. If Respondents simply intended to detain and question Petitioner Hamdi for purposes of intelligence gathering,[3] as they claim, there would be no need to transfer Petitioner Hamdi to the United States. Indeed, Respondents make no mention of the screening procedure that led to Petitioner Hamdi's present incarceration in Norfolk, Virginia. That screening procedure, however, also led Respondents to bring John Walker Lindh to the Eastern District of Virginia. In the absence of any explanation from Respondents, the circumstances of this case are inconsistent with the mere detention of an alleged enemy combatant.

2. The Conditions of Petitioner Hamdi's Confinement Are Consistent With Criminal Proceedings Rather than Detention of Enemy Combatants

Regulations governing the detention of captured enemy combatants–indeed, all persons taken into custody by the United States Armed Forces–are set forth in a joint service regulation entitled *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other*

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[3] Respondents never explain in the Mobbs Declaration or elsewhere why Petitioner Hamdi is particularly significant for purposes of their interest in intelligence gathering.

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Detainees (Oct. 1, 1997) ["EPW Regulations"] (attached as Exhibit 1). This regulation implements codified and customary international law, including the Geneva Convention Relative to the Treatment of Prisoners of War, for the U.S. military. Petitioner Hamdi is not being treated in accordance with these regulations.

The EPW Regulations require that "[a]ll persons taken into custody by the U.S. forces will be provided the protections of the [1949 Geneva Convention Relative to the Treatment of Prisoners of War] until some other status is determined by competent authority. EPW Reg. 1-5(a)(2). Similarly, the EPW Regulations also provide: "In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." EPW Reg. 1-6(a). As noted, these regulations reflect Article 5 of the Geneva Convention related to prisoners of war. Article 5 of the Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 ("GPW"). Pursuant to these provisions, a captured enemy combatant cannot be treated as anything other than an Enemy Prisoner of War ("EPW") until such a tribunal has determined an alternative status.

Respondents contend that Petitioner Hamdi is not entitled to treatment as an EPW, but do not claim to have provided a tribunal as required before Respondents may deny prisoner of war status to Petitioner Hamdi. Nor have Respondents complied with other provisions set forth in the EPW Regulations. For example, EPW Reg. 3-2(b) prohibits internment of persons in "correctional facilities housing military or civilian prisoners," "except in extreme circumstances, in the best interests of the individual."[4] EPWs also are not to be separated from other prisoners belonging to the armed forces with which they were serving at the time of their capture except with their consent.

[4] The EPW Regulations also require the roof of any internment facility to be marked with the letters "PW" denoting "Prisoner of War Camp," so as to be visible from the air. EPW Regs. 3-2(c).

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Id. 3-4(b). Finally, EPWs must be quartered under conditions as favorable as those of the detaining power's forces in the same area. *Id.* 3-4(e). Respondents have not complied with these regulations. Petitioner Hamdi is not contesting the conditions of his confinement; on the contrary, Respondents' failure to comply with the regulations that are applied to combatants indicates that Petitioner Hamdi is being held for potential prosecution, not as a combatant.

3. Petitioner Hamdi is being Punished

Petitioner Hamdi is being held in solitary confinement. He has been isolated from others similarly situated in Afghanistan and Guantanamo Bay, Cuba. He is prohibited from sharing a cell or communicating with other inmates at the Naval Brig. He is prohibited from having visitors with the exception of a representative of the International Committee of the Red Cross. He cannot make contact by telephone. He is prohibited from group prayer and group recreation. This "exclusion from human associations" constitutes solitary confinement, a "punishment of the most important and painful character." *See In re Medley*, 134 U.S. 160, 168-71 (1890).

Respondents have also steadfastly refused to explain when the armed conflict that purportedly authorizes the application of the laws of war to Petitioner Hamdi will end. The continuation of armed conflict with al-Qaida has no bearing on the propriety of Respondents' detention of Petitioner Hamdi, not only because Petitioner Hamdi has no connection to al-Qaida but also because the laws of war do not apply to the conflict between the United States and a non-state actor.[5] The conclusion of the conflict with the Taliban therefore constitutes the end of armed conflict for purposes of the authorization under international law to detain combatants. Respondents reticence to address this issue, moreover, illustrates Respondents' position that the duration of the Petitioner Hamdi's detention indeed may be unlimited.

[5] Because al Qaida is not a nation state, the President has announced that the Geneva Conventions do not apply to the conflict with this terrorist organization.

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Argument

1. **Judicial Review Must Ensure Compliance with the Constitution While Affording Due Deference to the Executive**

Brandishing the deference often afforded to the Executive's conduct of military affairs, Respondents contend that this Court need only "confirm that there is a factual basis supporting the military's determination that [Petitioner Hamdi] is an enemy combatant." Resp. at 16. Respondents' argument not only is inconsistent with the deference due the Executive branch in accordance with the separation of powers, it also implies the very unchecked power to imprison American citizens that was criticized by the Fourth Circuit. The judicial deference given to the Executive branch varies by the context in which the Executive purports to act. Here, the legality of Petitioner Hamdi's imprisonment cannot be determined simply by rubber-stamping Respondents' classification of Petitioner as an enemy combatant.

It is not contested that "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). At the same time, the decision to detain an American citizen pursuant to this authority is undoubtedly reviewable by the Court. *See Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002); *see also Quirin*, 317 U.S. at 27-28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.").[6]

[6] Respondents cite *Hirota v. MacArthur*, 338 U.S. 197 (1948) (Douglas, J., concurring), for the proposition that the propriety of the detention of combatants is a political question. Resp. at 15. Justice Douglas said nothing of the kind in *Hirota*. A dissenter in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), Justice Douglas explained in *Hirota*:

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. . . . It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation.
> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody.

338 U.S. at 204. The critical difference for the petitioners in *Hirota* was that the President had entered into an agreement with the Allied Powers to establish an International Military Tribunal. And because the President had "made arrangements with other nations for [the petitioners'] trial, he act[ed] in a political role on a military matter." Justice Douglas thus concluded that "[h]is discretion cannot be reviewed by the judiciary." *Id.* at 209.

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"[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *cf. Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). These comments reflect a long-standing suspicion of conduct by the Executive branch under the guise of national security that infringes upon constitutional rights. *Cf. Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946) ("In this country that fear [of military rule] has become part of our cultural and political institutions."). As the Supreme Court has explained, "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875).

Even when "martial law" is declared, the conduct of the Executive branch is subject to judicial review. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."). Furthermore, as the Supreme Court explained in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the geography of the Executive branch's authority to infringe upon individual liberties under martial law is limited by necessity:

> Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also

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> confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

Id. at 127; *see also Duncan v. Kahanamoku*, 327 U.S. at 326 (Murphy, J., concurring) ("Tested by the *Milligan* rule, the military proceedings in issue plainly lacked constitutional sanction.")

Likewise, the deference afforded to the Executive branch's decision to detain an American citizen diminishes by the degree to which the detention is unrelated to foreign policy, national security, or military affairs. *See Ex parte Endo*, 323 U.S. 283, 302 (1944). Put differently, judicial deference to the Executive branch is greatest with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war," and much less forgiving when the President purports to exercise his power as Commander in Chief at home. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

> [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Id. at 642 (Jackson, J., concurring). Even while World War II was in progress, the Supreme Court emphasized that "[w]hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Ex parte Endo*, 323 U.S. at 302. The Court therefore must examine the context of the Executive branch's exercise of its power in order to determine how much deference should be given to that exercise.

As noted by the court of appeals, "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional

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unprovoked attack." *Hamdi*, 2002 WL 1483908, at *5. This observation is consistent with an acknowledgment that issues related to national security "merit the most careful consideration." *United States v. U.S. District Court*, 407 U.S. 297, 319 (1972).

Because this case involves an American citizen, however, it has very few implications for the Executive branch's conduct of military affairs against our enemies. For example, Petitioner's claims have no relation to the treatment of enemy aliens, who are not entitled to constitutional protections. *Eisentrager*, 339 U.S. at 785. Similarly, Petitioner Hamdi has challenged his indefinite imprisonment by Respondents in this country, not the propriety of his temporary detention abroad. As explained below, these claims are constitutionally distinct and are drawn from different locations within the Constitution.

Respondents also liken this case to the deference afforded by courts in their review of an agency decision. In the administrative context, however, deference to administrative determinations is the result of a congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Congress has not, and could not, delegate the customary international law-making power to the military.

Even if the Court sought to apply principles from the administrative context, courts do not defer when Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. v. Nat. Resources Def. Council*, 467 U.S. 837, 842 (1984). As explained below, it has. *See* 18 U.S.C. § 4001(a).

Finally, deference is not warranted in the administrative context when a litigating position is "wholly unsupported by regulations, rulings, or administrative practice." *Smiley v. Citibank*, 517 U.S. 735, 741 (1996). Respondents' treatment of Petitioner Hamdi, in fact, is unsupported by the ostensibly applicable regulations applied by all branches of the United States military. *See* EPW Regulations. These regulations have no provision for "unlawful combatants," or even "enemy combatants" for that matter. *Cf. Hamdi*, 2002 WL 1483908, at *4 ("Indeed, the order does not mention the term enemy combatant at all."). More importantly, these regulations provide that "all

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person detained by the United States Armed Forces receive prisoner of war protection regardless of whether they are entitled to prisoner of war status under the [Geneva Conventions]." Capt. Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 Army Lawyer 16, 17 (Aug. 1994) (citing EPW Regulations ¶ 1-5). Respondents' decision to depart from these regulations certainly does not support a finding that Respondents' classification decision is entitled to substantial deference.

The Court of Appeals for the Fourth Circuit declined to address the "standards and procedures that should govern this case." *Hamdi*, 2002 WL 1483908, at *5. The appellate court simply noted that caution is warranted given that this case arises "in the context of foreign relations and national security." *Id.* at *3. Indeed, Respondents' detention of Petitioner is "not to be set aside by the courts without a clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted. *Quirin*, 317 U.S. at 25. At the same time, however, the court of appeals warned that Respondents do not have the power to detain a citizen "indefinitely without charges or counsel on the government's say-so." *Hamdi*, 2002 WL 1483908, at *5. In sum, while the questions raised by the Petition require a degree of "deference to the political branches," that deference should not be allowed to prevent Petitioner from adducing evidence to establish a "clear conviction that [his imprisonment is] in conflict with the Constitution [and] laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25.

II. Petitioner Hamdi's Constitutional Rights Outweigh The Government's Interest in Inteligence Gathering

A. Petitioner Hamdi's Citizenship Entitles Him To Assert Constitutional Protections

American citizenship distinguishes Petitioner Hamdi from others charged as "enemy combatants," and entitles him to assert constitutional protections against indefinite detention and punishment without due process. Respondents' allegation that Petitioner Hamdi fought on behalf of the Taliban is insufficient to strip Petitioner Hamdi of these significant protections. Likewise,

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Respondents' invocation of the customary laws of war does not mean that Petitioner Hamdi's imprisonment is consistent with the Constitution.[7]

Unlike aliens, American citizens are entitled to the protections of the Constitution both in the United States and abroad. *See Reid v. Covert*, 354 U.S. 1, 32-33 (1957) ("[The view that] constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him . . . is erroneous. The mere fact that [the defendants] had gone overseas . . . should not reduce the protection the Constitution gives them."); *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of citizen who was not a member of the United States armed forces). In *Eisentrager*, the Supreme Court explicitly distinguished the rights of citizens from those of enemy aliens, explaining that war "exposes the relative vulnerability of the alien's status." 339 U.S. at 772.[8] Specifically, the *Eisentrager* court rejected the application of Fifth Amendment rights to enemy aliens abroad. *Id.* at 782-85.

The Supreme Court in *Eisentrager* did not address the question whether a citizen fighting on behalf of a belligerent would be entitled to constitutional protections. But if status as an "enemy

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[7] In a statement unnecessary to the holding of its July 12, 2002, opinion, the Court of Appeals for the Fourth Circuit observed that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Hamdi*, 2002 WL 1483908, at *5. Respondents wrongly contend that this conclusion is the law of the case. Resp. at 7. Statements or observations unrelated to the court of appeals' holding do not become law of the case. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994)("It is to the holdings of our cases, rather than their dicta that we must attend."); *California v. Rooney*, 483 U.S. 307, 312-14 (1987) (dismissing writ of certiorari as improvidently granted on ground that issue was not squarely before lower court); *Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (noting that dicta does not become law of the case). In addition, because the political branches of the government have declared that the armed conflict with the Taliban has ended, and because Petitioner Hamdi is entitled to constitutional protections regardless of his status as an enemy combatant, the Fourth Circuit's dictum is inaccurate.

[8] Even during wartime, however, "enemy aliens" within the United States are not for that reason necessarily divested of rights. *See Von Moltke v. Gillies*, 332 U.S. 708, 740 (1948) (Burton, J., dissenting) ("Her status as an enemy alien does not, in itself, affect her right to counsel or the informed character of her plea of guilty and her waiver of counsel"); *Ex parte Kawato*, 317 U.S. 69, 78 (1942) (holding that enemy aliens residing in the United States are not denied access to courts); *cf. Eisentrager*, 339 U.S. at 775 ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists.").

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combatant" were sufficient in itself to eliminate protections ordinarily afforded under the Constitution, the *Eisentrager* court's discussion of citizenship would make little sense. In other words, if enemy combatants are by definition unprotected by the Constitution, the Supreme Court need not have addressed the issue of citizenship at all in order to reach the conclusion that the petitioners in *Eisentrager*, all of whom were unquestionably enemy combatants, could not assert rights under the Fifth Amendment.

In *Ex Parte Quirin*, of course, the Supreme Court stated that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is *unlawful because in violation of the law of war*." 317 U.S. at 37 (emphasis added). The petitioners in *Quirin* were accused of secretly entering the United States to engage in sabotage operations. As explained by the Court, these allegations charged a violation of the laws of war:

> The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 31. Accordingly, the petitioners in *Quirin* were subject to trial by military tribunal. *See id.* at 28; 10 U.S.C. § 821. But the fact that a citizen may be tried by a military tribunal for an offense in violation of the law of war has nothing to do with Petitioner Hamdi's challenge to his imprisonment. It does not mean that citizens accused as "enemy combatants" are indistinguishable from aliens who are so charged.

Moreover, Respondents do not assert that Petitioner Hamdi committed any offense against the law of war analogous to the petitioners in *Quirin*. Instead, Respondents claim that Petitioner Hamdi is not entitled to prisoner of war status because he "was captured as part of a Taliban unit." Resp. at 9 n.5. An individual who is not entitled to prisoner of war status, however, is not necessarily an "unlawful combatant." *See* Alan Rosas, The Legal Status of Prisoners of War 311

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(1976) ("In legal literature the term 'unlawful' (or 'unprivileged') combatant is sometimes used with respect also to such individual members of armed forces, who have forfeited their right to be treated as prisoners of war. In order to assess the desirability of such terminology, one should consider separately the situation of a spy, a person guilty of war crimes in general, and a person who has carried a perfidious attack under civilian disguise (saboteur, etc.)"). By the same token, "lawful combatants are always entitled to prisoner of war status, while the reverse is not necessarily true." *Id.* at 305.

Whether or not Petitioner Hamdi is entitled to prisoner of war status, and whether or not he would be subject to the jurisdiction of a military tribunal, he is entitled to constitutional protections like any other citizen. *See Reid*, 354 U.S. at 32-33; *Kinsella*, 361 U.S. at 244-48; *Eisentrager*, 339 U.S. at 772. Respondents' position that Petitioner Hamdi has no greater rights than if he were an enemy alien is simply inconsistent with this precedent and the significance of citizenship under our laws.

The importance of citizenship in this context is also reflected in a congressional statute, 18 U.S.C. § 4001(a). That statute provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." § 4001(a). The plain language of the statute prohibits the detention or imprisonment of citizens by the United States "except" by congressional legislation, and the other sub-paragraphs contained in the statute do not diminish the force of that language. *See* §§ 4001(b)(1) & (2).

Should the Court have any question as to the application of this statute to Respondents' conduct, the legislative history establishes that Congress sought to prohibit Respondents from engaging in the precise conduct challenged here. *See Chemehuevi Tribe of Indians v. Federal Power Comm.*, 420 U.S. 395, 405 (1975) (resorting to legislative history). In particular, Congress enacted § 4001(a) in 1971 "to prohibit the establishment of emergency detention camps and to provide that no citizen of the United States shall be committed for detention or imprisonment *in any facility of the United States Government* except in conformity with the provisions of title 18." H.R. No. 92-

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116, at 1434 (1971) (emphasis added). Likewise, the purposes set out in the relevant House report explain that the enabling legislation is designed to: "(1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists; and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use." *Id.*

In an effort to avoid the plain language and intent of this statute, Respondents urge the Court not to construe it in a manner that would "interfere with the longstanding authority of the President as Commander in Chief and the armed forces to detain enemy combatants during war time." Resp. at 12. In fact, Respondents suggest that a broad reading of § 4001(a) would implicate "grave and doubtful constitutional questions," and therefore that it should not be read to apply to "military detentions."

It is difficult to see how this statute would impose any serious obstacle to the Executive branch's conduct of military affairs. Indeed, a construction of the statute that authorized the indefinite detention of citizens by the military in the United States would appear to raise even more grave constitutional questions than those postulated by Respondents. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (rejecting reading of alien detention statute that would permit indefinite incarceration). Nonetheless, to the extent that application of the statute would hinder the conduct of military operations against citizens abroad, Respondents' argument suggests only that Congress did not intend § 4001(a) to apply outside the United States. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"). Accordingly, by bringing Petitioner Hamdi to the United States, Respondents are the architects of the conflict between their imprisonment of Petitioner Hamdi and 18 U.S.C. § 4001(a).

Respondents also urge that their incarceration of Petitioner Hamdi is consistent with

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§ 4001(a) because of the congressional authorization permitting the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . ." Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001). Similarly, Respondents suggest that Petitioner Hamdi's indefinite incarceration is authorized by a statute that appropriate funds related to the detention of prisoners of war. 10 U.S.C. § 956. These arguments are without merit.

Neither of these statutes contain any language explicitly authorizing the detention of citizens. In a similar context, the Supreme Court has explained that the broad power to detain citizens advanced by Respondents can be found only in clear and unmistakable terms:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

See Ex parte Endo, 323 U.S. at 300. The statutes cited by Respondents certainly do not contain clear and unmistakable language authorizing detention. In fact, the statutes cited by Respondents do not even "use the language of detention." *Id.* In violation of 18 U.S.C. § 4001(a), Petitioner Hamdi's incarceration simply has no basis in congressional act.

B. Petitioner Hamdi's Imprisonment Violates His Constitutional Right to Due Process of Law

Respondents maintain that as a result of the customary international legal authority to detain combatants, Petitioner Hamdi enjoys no constitutional protection against indefinite imprisonment. (Resp. at 10). This parsimonious approach to the Constitution ignores both text and precedent.

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The Due Process Clause of the Fifth Amendment prohibits the Government from "depriving" any person of liberty "without due process of law." U.S. Const. amend. V. "[G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' non-punitive 'circumstances.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Accordingly, "the serious constitutional problem" raised by Respondents' asserted power to impose "an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious." *Id.* at 692.

Petitioner Hamdi does not assert that the Constitution prohibited his custody by Respondents at all times. *See Ex parte Endo*, 323 U.S. at 301 ("We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. . . Some such power might indeed be necessary to the successful operation of the evacuation program."). The Petition therefore asserts no claim against unreasonable seizure under the Fourth Amendment. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133, 1140 n.10 (4th Cir. 1982). To be sure, the Executive branch's temporary detention of citizens during an emergency may be consistent with the Constitution. *Compare Moyer v. Peabody*, 212 U.S. 78, 85 (1909), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").

Whatever the case with respect to temporary detention, however, long term indefinite imprisonment poses a separate constitutional issue. *Moyer*, 212 U.S. at 85 (noting that case involving extended detention may "raise a different question" then temporary detention at issue); *see also Fisher*, 690 F.2d at 1140 n.10. That separate issue is presented by Respondents' indefinite imprisonment and punishment of Petitioner Hamdi. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1978) (holding that Due Process prohibits "punishment" of pretrial detainees); *In re Medley*, 134 U.S. 160, 171 (1890) (finding that solitary confinement constituted punishment). Petitioner Hamdi

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therefore has asserted nothing "new . . . under the Fifth Amendment." (Resp. at 10).

Also familiar is the potential conflict between Petitioner Hamdi's constitutional liberties and Respondents' broad exercise of Executive power. As the Supreme Court explained in *United States v. Robel*, 389 U.S. 258 (1967), when the exercise of an "enumerated power[] clashes with those individual liberties protected by the Bill of Rights, it is [the Federal Judiciary's] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *Id.* at 264; *see also United States District Court*, 407 U.S. at 299 (explaining that constitutionality of Executive branch's electronic surveillance for purposes of domestic security required "sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion"); *cf.* (Resp. at 10) ("the Court would have to balance the creation of such a right against the government's own interests"). At the same time, the Court should remain mindful that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Robel*, 389 U.S. at 264.

Respondents have offered almost no explanation for their continued detention of Petitioner Hamdi other than their assertion that his confinement may aid their intelligence gathering efforts. Such efforts are not sufficient to justify indefinite detention. *Cf. Youngstown Sheet & Tube*, 343 U.S. at 646 (Jackson, J., concurring) ("What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."). Indeed, the Government's desire to "fortify its intelligence collage" simply does not outweigh the considerable constitutional interests of American citizens at issue here. *United States District Court*, 407 U.S. at 325 (Douglas, J., concurring).

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Furthermore, the rights asserted by Petitioner Hamdi do not threaten to "unduly frustrate the efforts of Government" to act abroad. *United States District Court*, 407 U.S. at 315. As described above, the underlying claims reflect the fact that the context in which the Executive branch exercises its power affects the strength of the Executive's authority. *Youngstown Sheet & Tube Co.*, 343 U.S. at 587. The longer that Respondents imprison Petitioner Hamdi without due process, the weaker is their claim to the imposition of that authority, and the stronger is Petitioner Hamdi's challenge that his imprisonment violates the Constitution. At this point, affording respect to Petitioner Hamdi's constitutional claims is more intrinsic to the "concept of 'national defense'" than Respondents' claimed authority under international law.

III. International Law Does Not Authorize Petitioner Hamdi's Continued Detention

Aside from Petitioner Hamdi's constitutional claims, his imprisonment also is unsupported by the customary international law invoked by Respondents. The Executive branch concedes that the Geneva Conventions apply to those individuals who fought on behalf of the former Taliban regime in Afghanistan.[9] Respondents' authority to imprison those combatants therefore terminates upon evidence that hostilities with the Taliban are over. *See Hamdi*, 2002 WL 1483908, at *4 ("it has been the government's contention that Hamdi is an 'enemy combatant' and as such 'may be detained at least for the duration of the hostilities.'").

Federal courts have no independent authority to pronounce when a war begins or ends, and Petitioner Hamdi therefore does not contend that the judiciary has the authority to tell the Executive branch when to announce that the undeclared war on the Taliban regime in Afghanistan is at a close. But this Court certainly can determine whether the political branches have spoken on the issue. *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court

[9] See White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/>.

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may construe them . . . ."). Because many legal rights turn on the existence or non-existence of war, the Supreme Court often has been asked to make such a determination. *See, e.g., Lincoln v. United States*, 197 U.S. 419 (1905); *Dooley v. United States*, 182 U.S. 222 (1901).

In the *Prize Cases*, for example, the simple question before the Court was "whether a state of war existed." 67 U.S. at 665. To answer this question, the Court explained that "this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670; *accord Ludecke*, 335 U.S. at 171. The Court then held that the President's proclamation of a blockade was sufficient evidence that a state of armed conflict existed. 67 U.S. at 670. Likewise, in *The Protector*, 79 U.S. 700 (1871), the Supreme Court looked to "public act[s]" of the political departments to determine the beginning and end dates of the Civil War.

Accordingly, the Court's question regarding the end date for the armed conflict that Respondents allege gives them the authority to detain combatants points to a significant issue: whether Petitioner Hamdi is properly detained under the laws of war as a captured combatant who was affiliated with the former Taliban regime in Afghanistan. To answer this question, the Court should determine whether the political branches of government have spoken on the issue.

They have. On December 23, 2001, the United States recognized the newly installed government in Afghanistan. Amy Waldman, *New Leaders Set to Assume Power in Tranquil Kabul*, N.Y. Times, Dec. 22, 2001, at A1. As noted above, the President also has recognized in both a Proclamation and in proposed regulations that there has been a change of regimes in Afghanistan. *See* Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002).

And the President has terminated the national emergency initially declared by President Clinton specifically to address the Taliban regime in Afghanistan. *See* 64 Fed. Reg. 36759 (July 4, 1999). Pursuant to Executive Order 13268 of July 2, 2002, the President concluded that "the

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situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban . . . has been significantly altered given the success of the military campaign in Afghanistan." 67 Fed. Reg. 44751. The President therefore "revoke[d] that order and terminate[d] the national emergency declared in that order with respect to the Taliban." *Id.*

These public pronouncements demonstrate that the Executive branch has announced the conclusion of the armed conflict with the Taliban. Respondents' claim that hostilities remain "ongoing" is irrelevant to this conclusion. *See Lincoln*, 197 U.S. at 429 ("The fact that there was an insurrection of natives not recognized as belligerents in another part of [the Philipines] . . . did not give the President power to impose duties on imports" that he levied pursuant to his powers as Commander in Chief during war with Spain after war's conclusion). Similarly, the Executive branch's ongoing efforts to eliminate the terrorist organization al Qaida has no bearing on the conclusion of an "international armed conflict" between nation-states that triggered the application of the Geneva Conventions. Joan Fitzpatrick, *Military Commissions: Jurisdiction of Military Commissions and th eAmbiguous War on Terrorism*, 96 Am. Jrnl. Int'l L. 345, 346 (Apr. 2002). Consequently, even if the Court accepts the facts as reflected in the Mobbs Declaration, Petitioner Hamdi is entitled to immediate release.

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Conclusion

Wherefore, Petitioner Hamdi respectfully requests that the Court deny Respondents' Motion to Dismiss, and order other appropriate relief in accordance with 28 U.S.C. § 2243.

Respectfully submitted,

FRANK W. DUNHAM
Federal Public Defender

By: _____
Larry W. Shelton
Supervisory Assistant Federal Public Defender
Virginia State Bar No. 15205

_____
Jeremy C. Kamens
Assistant Federal Public Defender
Virginia State Bar No. 41596

Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
(757) 457-0800

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CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510

Geremy C. Kamens
Assistant Federal Public Defender

Exhibit 1

Exhibit 1

Army Regulation 190–6
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

SUMMARY of CHANGE

AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1
Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees -

This revision--

- Establishes a multi-service regulation for all services (para 1-4a).
- Ensures compliance with DOD Directive 2310.1 dated August 1994 (para 1-4g).
- Establishes HQDA, Deputy Chief of Staff for Operations as the primary Army Staff responsibility for the Enemy Prisoner of War, Civilian Internee and Retained Persons Program (para 1-4c).
- Establishes a DD FORM 2745, Enemy Prisoner of War(EPW) Capture Tag (para 2-1b).
- Highlights Combatant Commanders, Task Force Commanders and Joint Task Force Commanders responsibilities (para 1-4g).
- Establishes procedures for conducting tribunals (para 1-6).
- Establishes Public Affairs policy (para 1-9).
- Establishes policy for EPW held aboard ship (para 2-1b).
- Updates OCONUS evacuation policy (para 2-3).
- Establishes the use of Health and Comfort Packs as a temporary substitution for Advance of Pay for short term operations (para 3-4h).
- Updates procedures for contracting EPW (para 4-22).
- Combines AR 190-8 and AR 190-57 (para 6-1).

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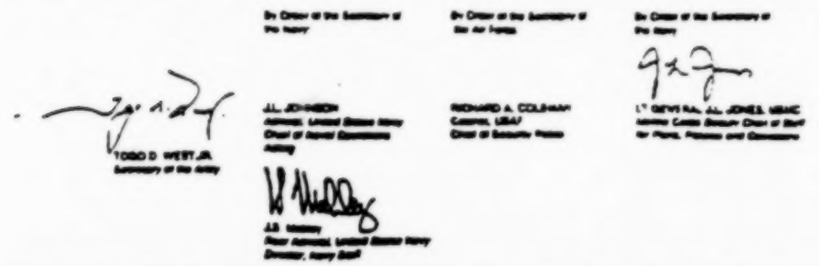
Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

*Army Regulation 190–8
*OPNAVINST 3461.6
*AFJI 31–304
*MCO 3461.1

Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees



History. This printing publishes a revision of this publication. Because the publication has been extensively revised the changed portions have not been highlighted.

Summary. This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees. This regulation is a consolidation of Army Regulation 190-8 and Army Regulation 190-57 and incorporates SECNAV Instruction 3461.3 and Air Force Joint Instruction 31-304. Policy and procedures established herein apply to the services and their capabilities to the extent that they are resourced and organized for enemy prisoner of war operations.

Applicability. This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.

Proponent and exception authority. The proponent of this regulation is the Deputy Chief of Staff for Operations and Plans. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Army management control process. The Regulation contains management control provisions in accordance with AR 11-2, but does not contain checklists for conducting management control. Reviews are used to accomplish assessment of management controls.

Supplementation. Army supplementation of this regulation and establishment of command or local forms is prohibited without prior approval from HQDA (DAMO-ODL), WASH DC 20310. Navy, Marine Corps and Air Force supplementation of this regulation is authorized, but is not required. If supplements are issued, major or second echelon commands will furnish one copy of each supplement to their headquarters, as follows: Navy, to the Chief of Naval Operations (N511), 2000 Navy Pentagon, Washington DC 20350-2000, Marine Corps, to the Commandant of the Marine Corps, HQ USMC (POS-10) 2 Navy Annex, Washington DC, 20380-1775 11), and Air Force, to HQ USAF/SPO, 1340 Air Force Pentagon, Washington, DC 20330-1340.

Suggested improvements. Users are invited to send comments and suggested improvements through channels as follows: HQDA (DAMO-ODL), WASH DC 20310-0440.

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Chapter 1
Introduction

1–1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and in the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Responsibilities

a. The Secretaries of the Military Departments. The Secretaries will—

(1) Develop internal policies and procedures consistent with this regulation in support of the Department of Defense (DOD), EPW/CI and other detainee programs.

(2) Ensure that appropriate training, as required, pursuant to DOD Directive 5100.77 is provided so that the principles of the Geneva Conventions, and the rights and obligations thereunder, are known by members of their service.

(3) Ensure that suspected or alleged violations of the international law of war are promptly reported and investigated per DOD Directive 5100.77.

(4) Conduct a periodic review of the EPW, CI and RP Program and training to ensure compliance with the law of war.

b. The Secretary of the Army (SA). The Secretary of the Army is the DOD Executive Agent (EA) for administering the DOD EPW, CI and RP Program. The SA, in coordination with the Assistant Secretary of Defense, International Security Affairs (ASD-ISA), will plan and develop the policy and coordinate the operation of the programs.

c. The Army Deputy Chief of Staff for Operations and Plans (DCSOPS). DCSOPS has primary Headquarters, Department of the Army (HQDA) staff responsibility for the EPW, CI and RP programs. The DCSOPS will—

(1) Develop and disseminate policy guidance for the treatment, care, accountability, legal status, and processing of EPW, CI, RP, and ODs.

(2) Report suspected or alleged violations of law committed by or against military personnel or civilians.

(3) Provide HQDA staff supervision for National Prisoner of War Information Center (NPWIC).

(4) Develop plans for the initial assignment and replacement of block internment serial numbers (ISNs) from the NPWIC to the Branch PWIC and for the assignment of the theater color section of the ISN.

(5) Provide necessary reports, coordination, technical advice, and staff assistance to:

(a) The Office of the Secretary of Defense (OSD).
(b) The Joint Chiefs of Staff (JCS).
(c) The military departments.
(d) Unified commands.
(e) Department of State and other Federal agencies.
(f) The International Committee of the Red Cross (ICRC).
(g) Protecting powers.

d. The Army Judge Advocate General (TJAG). The TJAG will provide HQDA guidance and advice to commanders on the legal aspects of the EPW, CI and RP program. TJAG will—

(1) Conduct liaison in coordination with the ASA-ISA, the Department of State, the Department of Justice, and other Federal agencies; the JCS; the Defense Intelligence Agency (DIA); the military departments; the ICRC; the Protecting Powers; and other detaining powers, as required.

(2) Provide advice and assistance to commanders on legal aspects of reported violations by EPW, CI, RP, and ODs.

(3) Provide theater guidelines for any EPW, CI and RP claims against the U.S. Government.

(4) Provide guidance regarding GPW Article 5 Tribunals.

e. Deputy Chief of Staff for Logistics (DCSLOG). The DCSLOG will ensure logistical resources are available to support EPW operations.

f. The Assistant Secretary of the Army Financial Management (ASA-FM&C). The ASA-FM&C will establish the policies and procedures governing entitlement, control, and accounting for pay, allowances, and personal funds for EPW, CI, RP, and ODs per the provisions of the GPW and GC.

g. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders have the overall responsibility for the EPW, CI and RP program, operations, and contingency plans in the theater of operation involved to ensure compliance with international law of war. DOD Directive 2310.1 provides that persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. U.S. Army Military Police have units specifically organized to perform the long-term functions associated with EPW/CI internment. Commanders must ensure the proper force structure is included in any joint operational plans. Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders will—

(1) Provide for an EPW, CI and RP camp liaison and assistance program to ensure the protection of U.S. interests per the Geneva Conventions upon the capture and transfer of EPW, CI, RP, and ODs to a host or other nation.

(2) Plan and procure logistical support to include: transportation, subsistence, personal, organizational and Nuclear, Biological & Chemical (NBC) clothing and equipment items, mail collection and distribution, laundry, and bath for EPW, CI and RP.

(3) Collect and dispose of captured enemy supplies and equipment through theater logistics and Explosive Ordnance Disposal (EOD) channels.

(4) Coordinate for acquisition of real estate, and as required, for planning, design, contracting, and construction of facilities for EPW, CI and RP with the Theater or JTF Engineer.

(5) Establish guidance for the use, transport, and evacuation of EPW, CI, RP, and ODs in logistical support operations.

(6) Identify requirements and allocations for Army Medical units in support of the EPW, CI and RP Program, and ensure that the

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medical annex of OPLANs, OPORDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC) USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2.

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Conventions, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1–6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise punished without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

1–7. The National Prisoner of War Information Center (NPWIC)

The NPWIC will—

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

(1) Complete name.
(2) ISN.
(3) Rank.
(4) Serial number.
(5) Date of birth.
(6) City of birth.
(7) Country of birth.
(8) Name and address of next of kin.
(9) Date of capture.
(10) Place of capture.
(11) Capturing unit.
(12) Circumstances of capture.
(13) Location of confiscated personal property.
(14) Nationality.
(15) General statement of health.
(16) Nation in whose armed services the individual is serving.
(17) Name and address of a person to be notified of the individual's capture.
(18) Address to which correspondence may be sent.
(19) Certificates of death or duly authenticated lists of the dead.
(20) Information showing the exact location of war graves together with particulars of the dead.
(21) Notification of capture.
(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the actions taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Armed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

1–8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within its assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.

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(2) Providing initial and replacement block ISN assignments to theater EPW, CI and RP processing organizations, and requests replacement ISNs from the NPWIC.

(3) Obtaining and storing information concerning all EPW, CI and RP, in the custody of U.S. Armed Forces, those captured by U.S. Armed Forces and transferred to other powers for internment (either temporarily or permanently), those EPW and RP transferred to CONUS for internment, and EPW, CI and RP released or repatriated. Obtaining and storing information about CI kept in the custody of U.S. Armed Forces within its assigned theater of operations who are subjected to assigned residence, interned, or released. Information required includes:

(a) That which may assist in an individual's identification.

(b) Certificates of death or authenticated lists of the dead.

(c) Information showing the location of war graves, together with particulars of the dead.

(d) Individual personal data, notification of capture, state of health, and changes.

(e) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(f) Authenticated lists of personal valuables left by CI.

(g) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

(4) Processing, storing and maintaining all personal property of escaped or dead EPW/CI/RP or articles of value which were not restored upon repatriation, until final disposition instructions are received from the NPWIC or next higher headquarters.

(5) Processing and replying to all inquiries received from the NPWIC, the chain of command, or other agencies as directed by the NPWIC concerning EPW/CI/RP and other protected persons in the theater of operations that the U.S. is responsible for under the Geneva Conventions.

(6) Making regular reports to the NPWIC, the chain of command, and supported internment facilities as required. This will include all pertinent information, official documents and information on judicial proceedings pertaining to EPW/CI/RP in the theater of operations for which the U.S. is responsible under the Geneva Conventions.

(7) Valuables and personal property which can be returned to a released or repatriated person are forwarded to the ICRC CTA or Protecting Power, as directed by the NPWIC.

(8) Valuables and personal property of deceased EPW, CI, and RP which can be released, will be forwarded to the next of kin through the NPWIC to the ICRC Central Tracing Agency or Protecting Power.

(9) Confiscated property which cannot be released or returned will be stored until final disposition is determined.

(a) Unclaimed property will be safeguarded by the Branch PWIC until all EPW/CI have been repatriated. If property ownership cannot be determined, said property shall be released through the MP BDE G-4 and SUPCOM to the Defense Reutilization and Marketing Office (DRMO).

(b) Unclaimed money and negotiable instruments will be maintained by the PWIC pending inquiry. Upon completion of all repatriation actions and inquiries, unclaimed money and negotiable instruments will be transferred to the FAC as abandoned property.

(10) Accountability data concerning personal and confiscated property of EPW, CI, and RP transferred to CONUS will be forwarded directly to the PWIC designated to support CONUS operations.

(11) The Branch PWIC is responsible for establishing and enforcing the information requirements that the United States forces will collect on EPW,CI and RP taken or held in the Branch PWIC's area of responsibility. The Branch PWIC will receive its information requirements from the NPWIC.

1-9. Public Affairs

In the interest of national security, and the protection of the prisoners from public curiosity, and in adherence to the GPW and GC, EPW, CI, RP and other detainees will not be photographed as per paragraph 1-5d. Interviews of EPW, CI, RP and other detainees by news media will not be permitted. Requests for media access to EPW, CI, or other detainee internment facilities will be coordinated through the Public Affairs Office, and the Staff Judge Advocate, and approved by the first commander who exercises General Court Martial Convening Authority over the internment facility. Requests for exception to policy will be forwarded through command channels to HQDA (SAPA-PP), Washington, D.C. 20310-0420.

Chapter 2
Beginning of Captivity EPW/RP

2-1. Initial actions upon capture

a. The commanding officer of the capturing unit will ensure that:

(1) All EPW/RP are protected, safeguarded, and accounted for per this regulation. This regulation applies from the time of capture until evacuation to designated internment facilities.

(a) Each EPW/RP will be searched immediately after capture. Use males to search males and females to search female prisoners, when possible. Weapons, ammunition, and equipment or documents with intelligence value will be confiscated and turned over to the nearest intelligence unit. Propaganda and other Psychological Operations (PSYOP) materials will be confiscated, identified by the EPW/RP name and ISN and turned over to the supporting EPW/CI PSYOP unit through intelligence channels. Currency will only be confiscated on the order of a commissioned officer and will be receipted for using DA Form 4137 (Evidence/Property Custody Document). EPW and RP are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental or religious value, and items used for eating except knives and forks.

(b) All prisoners of war and retained persons will, at the time of capture, be tagged using DD Form 2745. They will be searched for concealed weapons and items of intelligence. All equipment, documents, and personal property confiscated during the search must be tagged and administratively accounted for by the capturing unit. Capturing units must provide the: date of capture, location of capture (grid coordinates), capturing unit, and any special circumstances of the capture (how the EPW was captured). The remaining information will be included on the tag as it becomes available.

(c) The DD Form 2745 is performed in three parts. The form is individually numbered and is constructed of durable, waterproof, tear-resistant material, and has reinforced eye-holes at the top of parts A and C. Part A is attached to the detainee with wire, string, or other type of durable material. Part B is retained by the capturing unit and maintained in the unit's records. Part C is attached to the property confiscated from the detainee, so that it may later be matched to that detainee.

(d) Prisoners may be interrogated in the combat zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited. Prisoners may voluntarily cooperate with PSYOP personnel in the development, evaluation, or dissemination of PSYOP messages or products. Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions. Interrogations will normally be performed by intelligence or counterintelligence personnel.

(e) Prisoners will be humanely evacuated from the combat zone and into appropriate channels as quickly as possible. Instructions given to prisoners during evacuation from the combat zone will be, if possible, in their own language and as brief as possible. When military necessity requires delay in evacuation beyond a reasonable period of time, health and comfort items will be issued, such as food, potable water, appropriate clothing, shelter, and medical attention. Prisoners will not be unnecessarily exposed to danger while awaiting evacuation. The capturing unit may keep prisoners in the combat zone in cases where, due to wounds or sickness, prompt evacuation would be more dangerous to their survival than retention in the combat zone. Individuals presumed to have intelligence value should be separated immediately from other EPW.

(f) Accountability will be maintained for all evacuated prisoners, regardless of the evacuation channel used. Units designated to receive the prisoners at the collecting points or camps will prepare a receipt DD Form 629 (Receipt for Prisoner or Detained Person) with a list of each prisoner's name attached and provide a copy of the receipt to the escort.

(g) Prisoners will not be located next to obvious targets such as ammunition sites, fuel facilities, or communications equipment. First aid and medical treatment will be provided to the same extent that the United States provides to its own forces. Sick and wounded prisoners will be evacuated separately, but in the same manner as U.S. and allied forces. Accountability and security of prisoners and their possessions in medical facilities is the responsibility of the respective echelon commander.

b. Special policy pertaining to the temporary detention of EPW, CI, RP and other detained persons aboard United States naval vessels:

(1) Detention of EPW/RP on board naval vessels will be limited.

(2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.

(3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.

(4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.

(5) Use of immobilized vessels for temporary holding of EPW/RP is not authorized without SECDEF approval.

2-2. Evacuation and care of EPW and RP

Those units designated to hold and evacuate EPW and RP will:

a. Collect prisoners from capturing units, and evacuate them from the combat zone as soon as possible.

b. Ensure sick and wounded EPW and RP in their custody are classified, by qualified medical personnel, as either walking wounded or litter, or as non-walking wounded. Walking wounded or litter EPW will be evacuated through established evacuation channels. Non-walking wounded or sick EPW will be delivered to the nearest medical aid station and evacuated through medical channels. All detained personnel will remain physically segregated from U.S. and allied patients.

(1) Appropriate intelligence sources will be notified when EPW and RP are found in possession of large sums of U.S. or foreign currency. A receipt DA Form 4137 will be prepared to account for all property that is taken from the EPW. Copies of DD Form 629 (Receipt for Prisoner or Detained Person) and DA Form 4137 will be maintained to establish positive accountability of the EPW and their property and can be used to substantiate proper care and treatment at a later time. DA Form 4137 will be used to account for property released before final disposition is ordered. Records of disposition of property will be evacuated with prisoners for inclusion in their personnel records.

(2) EPW will be segregated into categories of officer, noncommissioned officer, enlisted, male, female, seniority, recognized ethnic groups, deserters or any other category that the senior officer or NCO having custody of the prisoners designate to ensure the security, health and welfare of the prisoners. Segregation should prevent prisoners from communicating by voice or visual means. Guards will communicate with the prisoners only to give commands and instructions.

(3) The requirements for safeguarding prisoners are the same as those for captured units.

c. In cases of mass capture or surrender of entire units, combat units should be examined and those with the greatest intelligence value identified for debriefing.

d. Repatriation or parole of the remainder should be considered, with final determination directed by HQDA. Prisoners will not be forced to be repatriated against their will. Prisoners who refuse repatriation will be treated as prisoners of war until their legal status and further disposition can be determined by competent authority.

2-3. Evacuation Policy

a. Evacuation of EPW or RP outside the theater of operations requires SECDEF approval.

b. Wounded EPW generally will not be evacuated to CONUS until released from medical channels. They will be processed through U.S. military police assets. If EPW are to be medically evacuated, they will be processed and accounted for per this regulation.

Chapter 3
Administration and Operation of EPW Internment Facilities

3-1. Establishment

Internment facilities will be established in the communications zone of each theater of operations for the purpose of receiving, accounting for, administering, securing, and logistically supporting EPW/RP.

3-2. EPW internment facilities

a. The operation of all EPW internment facilities is governed by the provisions of the Geneva Conventions.

b. The theater commander remains responsible for the humane treatment of EPW facilities. EPW/RP may be interned only in premises located on land and affording proper health and hygiene standards. Except in extreme circumstances, or in the best interests of the individual, EPW/RP will not be interned in correctional facilities housing military or civilian prisoners. Prisoners will not normally be interned in unhealthy areas, or where the climate proves to be injurious to them, and will be removed as soon as possible to a more favorable climate. Transit camps or collecting points will operate under conditions similar to those prescribed for permanent prisoner of war camps, and the prisoners will receive the same treatment as in permanent EPW camps.

c. The internment facility will be marked with the letters "PW" (Prisoner of War Camps) and will be placed so they will be clearly visible from the air during the daytime. Other markings may be used when agreed to by the combatant commanders and approved by HQDA.

3-3. EPW Facility Management

a. The United States may subject EPW/RP to internment and may have contingency plans to confine and enclose EPW in camps located both in and outside CONUS. Medical personnel and chaplains classified as RP, while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered prisoners of war. The EPW facility commander will provide command, control, accountability, administrative, and logistical support for the operation of all EPW/CI facilities. The EPW/CI facility commander will:

(1) Intern prisoners captured by or transferred to the custody of U.S. forces.

(2) Process interned prisoners to include tagging, assignment of ISN, fingerprinting, photographing, and weighing, as needed.

(a) EPW and RP may be required to show their identity card issued by his or her government; however in no case may the card be taken from the individual.

(b) If an EPW does not hold an identity card issued by his or her

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government, the EPW will be issued a completed DA Form 2662-R (EPW Identity Card). The identity card will be in the possession of the EPW at all times. A notation indicating preparation of DA Form 2662-R will be made under item 36 of DA Form 4237-R (Detainee Personnel Record). DA Form 2662-R will be reproduced locally on 3-by 3-inch card head to foot. A copy for reproduction purposes is located at the back of this regulation. DA Form 4237-R will be reproduced locally on 8 1/2 by 11-inch paper. A copy for reproduction purposes is located at the back of this regulation. These forms are for the use of Army only.

(c) DA Form 2663-R (Fingerprint Card) will be prepared in duplicate for each EPW/RP. One copy will be retained in the camp in which the EPW/RP is confined and will accompany the EPW/RP upon transfer. The other is forwarded to the Branch PWIC.

(3) Provide prisoners with humane treatment, health and welfare items, quarters, food, clothing, and medical care. Health Services Command (HSC) provides medical and dental care for EPW in federal or civilian health care facilities per HSC plans.

(4) Provide for morale, religious, intellectual, educational, social, physical and recreational activities for the prisoners.

(5) Establish liaison with the supporting Branch PWIC, collect necessary information regarding the location, the personal well-being, legal status, and any change thereto, of all prisoners retained by the command.

(6) Allow prisoners to correspond with their families and receive relief shipments.

(7) Provide prisoners copies of the 1949 Geneva Conventions (in their own language, if possible).

(8) Employ and compensate assigned prisoners based on verified needs/requirements and monitor all aspects of EPW and RP employment per this regulation. If sundry packets are provided, no advance pay is required.

(9) Provide command and control, and operate, administer, and secure the camp.

(10) Prepare necessary documents for administrative actions, court-martial charges or any disciplinary proceedings for prisoners.

(11) Post personnel files and maintain unit level records of proceedings.

(12) Supervise qualified EPW/RP in providing medical care and field sanitation/preventive medicine for prisoners.

(13) Provide the initial medical examination and monthly screening of prisoners.

(14) Maintain EPW labor and finance records on each prisoner per AR 37-1.

(15) Ensure preparation of monthly pay credit statements of prisoner's personal accounts and ensure pay for prisoners.

(16) Direct activities relating to the assignment and supervision of work projects for prisoners.

(17) Advise employers of provisions for handling EPW.

(18) Establish and maintain records of prisoner labor projects.

(19) Provide initial reports of and perform initial investigations and inquiries into prisoner labor injuries or incidents.

(20) Report allegations of criminal acts or war crimes committed by or against EPW/RP to the supporting element of the U.S. Army Criminal Investigation Command (USACIDC). Deaths resulting from other than natural causes will be investigated by USACIDC.

(21) Provide assistance to the medical facility commander to assess the threat posed by hospitalized EPW.

(22) Establish and maintain complete and accurate accountability information regarding the location, physical and legal status, training, and employment of all individuals in the custody of, or assigned to, the EPW facility. Information will be posted to the individual's personal, medical, and financial records, and will be provided to the supporting PWIC and next higher headquarters, as required.

(23) Provide an area for intelligence collection efforts.

g. USACIDC will ensure criminal investigative support for EPW and RP is planned and resources are allocated for this purpose.

3–4. Operation of prisoner of war internment facilities

EPW camps will be organized and operated, when possible, as other military commands. Each internment facility will be commanded by a commissioned officer of the U.S. Military. The following provisions will be observed.

a. The Geneva Conventions will be posted within the camp in the language(s) of the EPW/RP nation(s). A copy of the text will be supplied, on request, to any person who does not have access to posted copies. The supporting EPW/CI PSYOP unit can assist in preparing and disseminating native language copies of the text as well as other translation, printing, and audio-visual information dissemination support.

b. EPW will be interned in camps according to their nationality and language. They will not be separated from other prisoners belonging to the Armed Forces with which they were serving at the time of their capture, except with their consent. Officers will be separated from enlisted personnel and females will be separated from males.

c. EPW representatives will be authorized for EPW Camps.

(1) At each enlisted EPW or branch camp, EPW will select a prisoner representative. These representatives will be elected by secret ballot every 6 months and are eligible for reelection. EPW will be permitted to consult freely with their representatives. In turn, their representatives will represent them before:

(a) The military authorities.

(b) The Protecting Power.

(c) The ICRC.

(d) Other relief or aid organizations.

(2) In officer EPW camps or in camps with both officers and enlisted EPW, the senior EPW officer, unless incapacitated or incompetent, will be recognized as the prisoner representative. In officer EPW camps, one or more advisors chosen by the EPW officers will assist the prisoner representative. The supporting EPW/CI PSYOP unit can assist in identifying officers, key communicators, and English speaking EPW who may be hiding within the camp population.

(3) In mixed camps (officers and enlisted), one or more enlisted advisors will be elected to assist the EPW officer representative.

(4) The camp commander will be designated as the final approval authority for each elected prisoner representative. When the camp commander denies, approves, or dismisses an elected representative, a notice to that effect will be sent through channels to HQDA, (DAMO-ODL) NPWIC for forwarding to the ICRC or the PP. Reasons for the refusal will be included. EPW will then be permitted to elect another representative.

(5) RP (medical personnel and chaplains) are not considered prisoners of war and therefore may not elect prisoner representatives. The senior medical officer in each camp will be responsible for matters connected with the activities of retained medical personnel. Individual chaplains, like the responsible medical officer, will have direct access to camp authorities.

(6) Prisoner representatives may appoint EPW assistants. These assistants are in addition to the advisors provided for in (2) above. The camp commander will also approve the selection of such assistants and their continuance in those positions.

(7) Prisoner representatives must be of the same nationality, observe the same customs, and speak the same language as the EPW they represent. EPW interned in separate compounds due to differing nationality, language, or customs will be permitted to have their own prisoner representative according to (1) through (4) above. The internment facility commander will establish the local policy for an escort to accompany the representatives.

(8) Duties, responsibilities, and available resources.

(a) Representatives will be responsible for furthering the physical, spiritual, and intellectual well-being of the persons they represent. They will not exercise any disciplinary powers. They will not perform any other work if the work interferes with their duties as representatives. They will be allowed a reasonable time to acquaint their successors with their duties and related current affairs.

(b) Representatives may be given the freedom of movement needed to accomplish their duties, such as inspection of labor detachments and receipt of supplies. Ordinarily, representatives will be permitted to visit places where EPW, whose interests they represent, are detained.

(c) Postal and telegraph facilities will be made available to prisoner representatives for communicating with the U.S. Army authorities; Protecting Powers, if any; the ICRC and its delegates; the Mixed Medical Commission, and other organizations authorized to assist EPW. Prisoner representatives of branch camps will be granted the same facilities for communication with the prisoner representative of the parent camp.

d. EPW/RP social privileges. Social privileges will be subject to security considerations and camp discipline. EPW/RP will be encouraged to take part in intellectual, educational, and recreational activities. The introduction of political overtones into or the furtherance of anti-U.S. propaganda objectives through these activities is prohibited. The supporting EPW/CI PSYOP unit can assist in identifying agitators, malcontents, and political officers who may create resistance within the camp. These units are also trained to develop and implement programs to reduce hostile political activity and to persuade EPW/CI populations to accept U.S. authority and regulations.

e. EPW/RP will be quartered under conditions as favorable as those for the force of the detaining power billeted in the same area. The conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health. The foregoing shall apply in particular to the dormitories of EPW/RP as it regards both total surface and minimum cubic space and the general installation of bedding and blankets. Quarters furnished to EPW/RP must be protected from dampness, must be adequately lit and heated (particularly between dusk and lights-out), and must have adequate precautions taken against the dangers of fire. In camps accommodating both sexes, EPW/RP will be provided with separate facilities for women. When possible consult the preventive medicine authority in theater for provisions of minimum living space and sanitary facilities.

f. The daily food rations will be sufficient in quantity, quality, and variety to keep EPW/RP in good health and prevent loss of weight or development of nutritional deficiencies.

(1) Account will be taken of the habitual diet of the prisoners.

(2) EPW/RP who work may be given additional rations when required.

(3) Sufficient drinking water will be supplied to EPW/RP.

(4) The use of tobacco will be permitted in designated smoking areas.

(5) EPW will, as far as possible, be associated with the preparation of their meals and may be employed for that purpose in the kitchens. Furthermore, they will be given means of preparing additional food in their possession. Food service handlers must have training in sanitary methods of food service.

(6) Adequate premises will be provided for messing.

(7) Collective disciplinary measures affecting food are prohibited.

g. Clothing, underwear, and footwear will be supplied to EPW/RP in sufficient quantities, and allowances will be made for the climate of the region where the prisoners are detained. Captured uniforms of enemy armed forces will, if suitable for the climate, be made available to clothe EPW/RP. The camp commander will ensure the regular replacement and repair of the above articles. EPW/RP who work will receive clothing appropriate to the nature or location of the work demands.

h. Canteens. EPW/RP will be provided sundry/health and comfort packs, which may be supplemented with items tailored to their cultural needs, as a temporary substitute for establishing canteen operations. When directed by the Theater Army Provost Marshal or senior Military Police officer in the internment facilities' chain of command, canteens will be installed in all camps, where EPW/RP may procure foodstuffs, soap, tobacco and ordinary articles in daily use. The tariff will never exceed local market prices. When authorized, canteens will be operated IAW the provisions of the GPW. Procedures regarding EPW/RP payment for canteen purchases are contained in AR 37-1. Profits made by canteen canteens will be used for the benefit of the prisoners, a special fund will be created for this purpose. The prisoners' representative may make suggestions regarding the management of the canteen and of this fund. When an internment facility is closed, the credit balance of the special fund will be transferred to another U.S. internment facility operating in theater. When all facilities are closed, funds will be turned over to an international welfare organization. The fund will be employed for the benefit of EPW/RP of the same nationalities as those who have contributed to the fund. In case of a general repatriation, profits will be kept by the United States.

i. Hygiene and medical care.

(1) The United States is bound to take all sanitary measures necessary to ensure clean and healthy camps to prevent epidemics. EPW/RP will have access, day and night, to latrines that conform to the rules of hygiene and are maintained in a constant state of cleanliness. In camps in which women EPW/RP are accommodated, separate latrines will be provided for them. EPW/RP will have sufficient water and soap for their personal needs and laundry. The necessary facilities and time will be made available for these purposes. The supporting EPW/CI PSYOP unit can assist in maintaining and improving health and sanitary conditions by producing and disseminating informational products concerning proper hygiene, sanitation, and food preparation, where required.

(2) Every camp will have an infirmary. EPW/RP with a contagious disease, mental condition, or other illness, as determined by the medical officer, will be isolated from other persons. A list of endemic diseases of military importance can be obtained from the theater surgeon or preventive medicine officer. EPW/RP will be immunized and reimmunized against other diseases as recommended by the Theater Surgeon. EPW/RP suffering from serious disease, or whose condition necessitates special treatment, surgery, or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given. Special facilities will be available for the care and rehabilitation of the disabled, particularly the blind. EPW/RP will be accorded the attention of medical personnel of the power on which they depend and, if possible, of their nationality. EPW/RP will not be denied medical care. The detaining authorities shall, upon request, issue to every EPW/RP who has undergone treatment, an official certificate indicating the nature of the illness or injury, and the duration and kind of treatment received. A duplicate of this certificate will be forwarded to the ICRC. The detaining authority will also ensure medical personnel properly complete the SF 88 (Report of Medical Examination), SF 600 (Chronological Record of Medical Care and DA Form 3444 (Treatment Record). The cost of treatment will be borne by the United States.

(3) Medical inspections of EPW/RP will be held at least once a month, where each detainee will be weighed and the weight recorded on DA Form 2664-R (Weight Register). DA Form 2664-R will be reproduced locally on 8- by 5-inch card. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only. The purpose of these inspections will be to monitor the general state of health, nutrition, and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, venereal disease, lice, louse-borne diseases and HIV.

(4) EPW who, though not attached to the medical service of the Armed Forces, are physicians, surgeons, dentists, nurses, or medical orderlies may be required to exercise their medical functions in the interests of prisoners of war dependent on the same power after being certified per Paragraph 3-15. They will continue to be classified as EPW but will receive the same treatment as corresponding RP (medical personnel). They will be exempted from any other work.

(5) Experimental research will not be conducted on EPW/RP.

3–5. Procedures for prisoner of war correspondence

a. EPW/RP will be allowed to send and receive letters and cards. There is no restriction on the number or length of letters or cards EPW/RP may receive. EPW/RP will be permitted to send not less than two letters and four cards monthly, in addition to the captors

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cards provided in Article 70, GPW. In the event EPW/RP are prevented from writing their monthly quota of letters and cards because of a lack of stationery forms, they will be allowed to make up their quotas when forms are available.

b. All persons may address complaints, in writing to U.S. military authorities and the Protecting Power. These communications will not be limited in length or number, nor will they be charged against the person's correspondence quota. They will be transmitted without delay.

c. Letters and cards addressed to persons other than representatives of a Protecting Power or to U.S. military authorities will not:

(1) Contain complaints or criticism of any governmental agency or official.

(2) Refer to events of capture.

(3) Compare camps.

(4) Contain quotations from books or other writings.

(5) Contain numbers, ciphers, codes, music symbols, shorthand, marks, or signs other than those used for normal punctuation.

(6) Contain military information on members of EPW/RP. (Exception: Letters to a Protecting Power or prisoner representative or to a relief or aid organization.)

(7) Should any such correspondence be discovered, it will be turned over to the supporting counterintelligence element.

d. Correspondence forms.

(1) EPW will use DA Form 2667-R (Prisoner of War Mail (Letter)) and DA Form 2668-R (Prisoner of War (Post Card)) for correspondence, except as authorized elsewhere in this regulation. DA Form 2667-R will be reproduced on 8 1/2-by 11-inch paper, head to head. DA Form 2668-R will be reproduced locally on 6-by 4-inch cards, head to foot. Copies for reproduction purposes are located at the back of this regulation. These forms are for the use of Army only. Legal documents may be written on blank paper instead of DA forms. Prisoner representatives may use ordinary paper in writing to:

(a) The Protecting Power.

(b) ICRC.

(c) Other approved relief or aid organizations.

(d) U.S. military authorities.

(2) Except for official correspondence by prisoner representatives or unless required by HQDA, communication in two or more copies is prohibited.

(3) Camp commanders will distribute DA letter and card forms to EPW/RP.

(4) Upon Completion of DA Form 4237-R, but not later than 1 week after arrival at a camp for processing, each EPW or RP will be permitted to send a DA Form 2666-R to a relative or next of kin.

(5) Within a period of not more than 1 week after arrival at the first EPW camp or when an EPW/RP's address is changed by transfer to a hospital or to another camp, a DA Form 2665-R (Capture Card for Prisoner of War) will be filled out and forwarded to the Branch PWIC. DA Form 2665-R will be reproduced locally on 6-by 4-inch card, head to foot, a copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only.

e. Subject to (1) and (2) below, outgoing letters and cards will be sent unsealed directly from the camp to the theater commander's designated censorship element. All incoming letters and cards that arrive at a camp without having been censored will be sent to the designated censorship element before delivery to addressees.

(1) Communication to the Protecting Power or the ICRC. Letters and cards not intended for other addressees and not containing enclosure for other addressees will be forwarded directly from the camp to the proper Branch PWIC.

(2) Other correspondence. Outgoing letters and cards from a branch camp's EPW will be forwarded as soon as possible.

f. Date and packaging of correspondence. Letters and cards will be forwarded without undue delay in pouches or in government envelopes.

(1) EPW/RP may not write letters for others who are able to write. If an EPW/RP is unable to write, the camp commander may permit another person to write the message. The person doing the writing will countersign the message.

(2) EPW/RP legal documents may be enclosed with outgoing correspondence. When it becomes necessary for a detainee to send a legal document, the document and forwarding letter or card may be enclosed in a plain envelope.

(3) EPW/RP will not send maps, sketches, or drawings in outgoing correspondence.

g. Individuals will not be permitted to mail or receive registered, certified, insured, or COD.

h. Letters and cards to or from EPW/RP sent by ordinary mail are postage free.

i. Outgoing letters and cards will be secured by using locked boxes or similar means. Only authorized U.S. personnel will handle outgoing mail. Incoming mail may be sorted by detainees when supervised by U.S. personnel.

j. Censorship of EPW/RP mail may be instituted by the theater commander as follows:

(1) Outgoing letters and cards may be examined and read by the camp commander or his designated representatives. No censorship action of any kind will be taken at the camp. The camp commander will return to the sender for rewriting any outgoing correspondence containing obvious deviations from regulations with a copy provided to the supporting counterintelligence element.

(2) Camp commanders will designate U.S. military personnel to supervise the opening of all mail pouches containing incoming letters and cards for detainees. These items will be carefully examined by the named personnel before delivery to detainees.

(3) EPW/CI wishing to make complaints concerning mail delivery must direct those complaints to:

(a) The camp authorities.

(b) The responsible major commander.

(c) The Protecting Power/ICRC.

k. Parcels.

(1) Persons may receive individual parcels and collective shipments containing:

(a) Foodstuffs.

(b) Clothing.

(c) Medical supplies.

(d) Articles of a religious, educational, or recreational nature.

(2) EPW/RP will not be permitted to mail parcels (Article 16, 1974 Universal Postal Convention).

(3) Parcels received for transferred persons will be forwarded immediately.

(4) Nonperishable articles received for persons who have died or escaped, or who have been repatriated, will be forwarded to the Branch PWIC. Perishable items received for deceased or escaped persons will be released to the prisoner representative who will deliver them to the camp infirmary or hospital for the benefit of EPW/RP.

(5) The contents of all incoming parcels will be examined at the camp by a U.S. officer in the presence of the addressee or the named representative. When considered necessary, the camp commander may request that the parcel be examined by the censors. The articles in each parcel will be removed. The string, the inner wrappings, the outer container, and any extraneous items found in the parcel will not be turned over to the EPW/RP or the designated representative. Examination will be close enough to reveal concealed articles and messages; however, undue destruction of contents of parcels will be avoided.

l. EPW/RP may send and receive telegrams as determined by the camp commander. They may not make or receive telephone calls.

(1) At a minimum:

(a) A detainee who has not received mail from next of kin for 3 months may send a telegram. One month from the date a previous telegram was sent, a detainee who has not received a written answer or other communication from the addressee may send another telegram.

(b) Detainees unable to receive mail from their next of kin or send mail to them by ordinary postal routes, or who are a great distance from their home, will be permitted to send one telegram a month.

(c) A person who is seriously ill, or who has received news of serious illness or death in the family, may be permitted to send a telegram. The camp commander may authorize the sending of additional telegrams.

(2) The sending of telegrams as provided for in (1) above will be governed by the following:

(a) The message proper will consist of not more than 15 words.

(b) The cost of sending the telegram will be debited to the person's account.

(c) Arrangements for messages going to or through enemy-occupied countries will be made with the ICRC Field Director.

(d) Telegrams, as a general rule, shall be written in their native language.

(e) No telegram will be sent to a Government official or to a Protecting Power.

(f) Telegrams are subject to the same procedures for censorship listed in paragraph 3-5*j*(2).

m. EPW/RP may receive books. Books that arrive at camps uncensored will be censored. Publications containing maps may be made available to the EPW/RP upon approval of the camp commander, provided they do not contain maps of the territory surrounding the camps. Books, included in parcels of clothing and foodstuffs, may be confiscated on order of the camp commander.

n. The following may be made available to EPW/RP:

(1) Current newspapers and magazines published in the English language and selected by the camp commander.

(2) Unmarked, unused magazines in the English language, published in the United States, and distributed by approved relief or aid organizations at the discretion of the camp commanders after censorship.

(3) Foreign language newspapers and magazines published in the United States, upon approval of the camp commander and after censorship of individual issues.

(4) Newspapers and magazines published outside the United States, regardless of language, must be approved by the theater commander.

3–6. Discipline and security

Measures needed to maintain discipline and security will be established in each camp and rigidly enforced. The camp commander will maintain records of disciplinary punishments. These records will be open to inspection by the Protecting Power.

a. The following acts will not be permitted:

(1) Fraternization between EPW, RP and U.S. military or civilian personnel. Fraternization is defined as improper or excessive communications or actions between U.S. Armed Forces personnel and EPW/RP.

(2) Donating or receiving gifts or engaging in any commercial activity between persons in U.S. custody and U.S. personnel.

(3) Setting up of courts by detainees. Disciplinary powers will not be delegated to or exercised by EPW/RP. Punishment will not be administered by EPW/RP.

b. The GPW, regulations, orders, the contents of any special agreements and notices on the conduct and activities of detainees will be published in a language the detainee understands. They will be posted in places within each camp where the detainees may read them and will be made available to persons who do not have access to posted copies. Additional copies will be given to the prisoner representatives. Every order and command will be addressed to detainees personally. The supporting EPW/CI PSYOP unit may assist in providing necessary printed, loudspeaker, or other audio-visual support in communicating directly to EPW/RP. To protect persons from acts of violence, bodily injury, and threats of reprisals at the hands of fellow detainees, a copy of the following notice in the detainees' language will be posted in every compound:

NOTICE

EPW/RP who fear that their lives are in danger or that they may suffer physical injury at the hands of other EPW/RP are encouraged to report the fact personally to any U.S. Armed Forces Police or the camp warden, consulting the EPW/CI representatives. From that time on, the camp commander will assure adequate protection to such EPW/RP by segregation, transfer, or other means. EPW/RP who neglect to follow instructions will be punished.

Signed (Commanding Officer)

c. The following military courtesies are required of EPW:

(1) When the U.S. national anthem is played or "To the Colors" or "Retreat" is sounded, EPW not in buildings will stand at attention and face toward the music or colors.

(2) Besides the courtesies required in their own armies toward their officers, enlisted EPW will salute all commissioned officers of the U.S. Armed Forces. Officer EPW will be required to salute only officers of a higher rank and the camp commander regardless of grade.

(3) EPW may salute in the way prescribed by regulations in force in their own armies.

(4) Other military courtesies will be rendered per AR 600-25 (Salutes, Honors, and Visits of Courtesy) and FM-22-5 (Drill and Ceremonies).

d. U.S. military personnel will extend the following courtesies toward EPW:

(1) U.S. military personnel will not be required to salute EPW or assume the position of attention when addressing them; however, U.S. officers will return the salutes of EPW.

(2) When addressing senior officer EPW on official business, U.S. military personnel will be courteous and extend the respect due them by grade and age.

e. Flags upon which an enemy political emblem or device appears will be seized. EPW/RP will not have any political emblems, insignia, flag, or picture of political leaders. Badges of grade and nationality, and decorations worn as part of the uniform are permitted. EPW/RP may have pictures of political leaders that appear in magazines, books, and newspapers if the pictures are not removed.

f. Security guidelines outlined below concern the custody and use of EPW/RP.

(1) *Guard over details.* EPW on work details will be guarded as required to provide security against escape. Selected EPW/RP may be employed without guards in areas where military personnel are on duty if:

(a) EPW/RP are under a U.S. work supervisor.

(b) Frequent counts of detainees and work inspections are made at irregular intervals.

(2) *Preventing escape.* The camp commander will ensure that each EPW/RP understands the meaning of the English word "halt". If EPW/RP attempt to escape, the guard will shout "halt" three times, thereafter the guard will use the least amount of force necessary to halt the EPW/RP. If there is no other effective means of preventing escape, deadly force may be used.

(a) In an attempted escape from a fenced enclosure, a prisoner will not be fired at unless he/she has cleared the outside fence and is making further effort to escape.

(b) EPW/RP attempting to escape outside a fenced enclosure will be fired on if they do not halt after the third command to halt.

(c) An EPW/RP will have succeeded in escaping when he or she has:

1. Joined the armed forces of the power on which he or she depends or those of an ally of that power.

2. Left the territory under U.S. control or control of U.S. allied powers.

3. Joined a ship flying the flag of the power on which he or she depends, or of an ally of that power, in U.S. territorial waters, and the ship is not under U.S. control.

(d) An EPW who has successfully escaped shall not be punished for the escape if subsequently recaptured.

3–7. Punitive Jurisdiction

a. EPW/RP are subject to punishment under the Uniform Code of Military Justice and other U.S. Laws, regulations and orders in force during the time of their detention.

b. Judicial proceedings against EPW and RP will be by courts-martial or by civil courts. When EPW are tried by courts-martial, pretrial, trial, and post-trial procedures will be according to the UCMJ and the U.S. Manual for Courts-Martial. An EPW will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried.

c. When possible, disciplinary rather than judicial measures will be taken for an offense. The disciplinary measures below are authorized:

(1) Suspend or eliminate privileges granted over and above the minimum privileges provided for in the GPW and GC.

(2) Confinement.

(3) A fine not to exceed one-half of the advance of pay (article 60 GPW) and working pay (article 62 GPW) that the detainee would otherwise receive during a period of not more than 30 days.

(4) Fatigue duties not exceeding 2 hours daily. This punishment will not be applied to officers.

d. EPW and RP rights. Before any disciplinary punishment is pronounced, EPW/RP will be given precise information regarding the offenses for which they are accused. They will be given a chance to explain their conduct and to defend themselves. They will be permitted to call witnesses and to have use of a qualified interpreter, if necessary and reasonably available. The board's decision will be announced to the person and to the person's representative.

e. The following are limitations on punishment:

(1) Collective punishment for individual acts, corporal punishment, imprisonment in premises without sunlight, and any form of torture or cruelty is forbidden.

(2) EPW may not be deprived of their grade or prevented from wearing insignia of grade and nationality.

(3) No EPW or RP will be handcuffed or tied, except to ensure safe custody or when prescribed by a responsible medical officer as needed to control a medical case requiring restraint.

(4) No EPW or RP may be punished more than once for the same act or sentenced to any penalties except those authorized herein.

(5) In no case will disciplinary punishments be inhumane, brutal, or dangerous to the person's health. The length of a single disciplinary punishment will not exceed 30 days. Confinement served while awaiting the hearing of a disciplinary offense or the award of disciplinary punishment will be deducted from punishment awarded. No more than 30 days punishment may be prescribed even if a person is answerable for several acts at the same time. This is true whether such acts are related or not. The period between pronouncing an award of disciplinary punishment and commencing punishment will not exceed 30 days.

(6) When EPW or RP are awarded a further disciplinary punishment, a period of at least 3 days will elapse between punishments if the length of one of the punishments is 10 days or more.

(7) EPW or RP being disciplined or judicially punished will not be subjected to more severe treatment than that authorized for the same offense by members of the U.S. Armed Forces of equal grade.

(8) EPW or RP sentenced by a courts-martial or awarded disciplinary punishment will not be treated differently from other detainees after their punishment.

f. Offenses and warranted punishments. EPW or RP who attempt to escape or escape the confines of the camp, but who do not succeed in their escape, will be liable only to disciplinary punishments for those escape acts. They will not be liable to judicial proceedings, even if they are repeat offenders. Escapes or attempts to escape, even if they are repeat offenses, will not be considered aggravating circumstances if detainees are tried by judicial proceedings for offenses committed during their escapes or attempts to escape. Offenses, such as those against public property, theft without intention of self-enrichment, drawing up or use of false papers, or wearing of civilian clothing, that are committed by detainees with the sole intent of making their escape easier and that do not entail any violence against life or limb will warrant disciplinary punishment only. Because of attempts to escape, EPW and RP may be subjected to close watch. The watch must not affect the state of their health. The EPW and RP warrant must be in camp. The watch must not deprive them of the safeguards granted by the Geneva Conventions. Persons who aid or abet an escape or an attempt to escape will be liable on this count for disciplinary punishment only.

g. Offenses against discipline. EPW and RP accused of an offense against disciplinary measures will not be confined pending a hearing, unless members of the U.S. Armed Forces would be confined if they were accused of a similar offense or unless camp order and discipline would be jeopardized. A period spent in confinement awaiting disposal of an offense against disciplinary measures will be reduced to an absolute minimum. It will not exceed 14 days.

h. Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of the U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. In no case will this confinement exceed 3 months. A period spent in confinement while awaiting trial will be deducted from a sentence of imprisonment. The period will be taken into account in fixing a penalty.

i. Retention of Geneva Convention benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protection of the Geneva Conventions. EPW, RP undergoing confinement will:

(1) Continue to enjoy the benefits of the Geneva Conventions except when such benefits do not apply because detainees are confined.

(2) Be permitted to exercise their right to complain and to confer with visiting representatives of the Protecting Power.

(3) Not be deprived of the prerogatives attached to their grade.

(4) Be allowed to exercise and to stay in the open air at least 2 hours daily.

(5) Be given medical attention as prescribed in this regulation.

(6) Be permitted to read and write and to send and receive letters and cards. Parcels, however, may be withheld from them until the punishment is completed. Such parcels will be released to the safekeeping of the detainee representative. If perishable goods are contained in the parcels, the detainee representative will give them to the camp infirmary or hospital to distribute them fairly among the other detainees.

3–8. Judicial proceedings

a. No EPW or RP will be tried or sentenced for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed.

b. No moral or physical coercion will be exerted to induce EPW or RP to admit guilt for any act.

c. No EPW or RP will be convicted without having had the chance to present a defense and without having the assistance of a qualified advocate or counsel.

d. Accused persons will be notified promptly of the charges in writing. Charges will be in a language understood by the accused. These persons will be tried as soon as possible. A notification (in duplicate) of proceedings against a detainee will be transmitted through channels to the NPWIC. The NPWIC will send such notification to the Protecting Power in cases of charges involving the death penalty or imprisonment for 2 years or more. Upon request, the Protecting Power will be furnished data on the status of such proceedings. Furthermore, the Protecting Power will be entitled, upon request, to be furnished with all data on any other proceedings carried against a detainee. The information will be sent without delay. Trial will not commence until 3 weeks after the Protecting Power has been notified. Unless evidence is submitted at the opening of the trial that this regulation has been fully complied with, the trial will not proceed. The following information will be provided:

(1) Surname and first name, grade, if proper, ISN, date of birth, and profession, trade, or prior civil capacity of the detainee.

(2) Place of internment or confinement.

(3) Specification of the charges with penal provisions under which they are brought.

(4) Designation of the court that will hear the case.

e. The EPW representatives will be informed of all judicial proceedings against EPW and RP and the results of the proceedings. Records of trials will be kept by the first Staff Judge Advocates General office in the internment facility's chain of command. These records will be open to inspection by representatives of the Protecting Power.

f. In each trial by court-martial, accused persons will be entitled to assistance by one of his prisoner comrades, a qualified advocate or counsel of their own choice, to the calling of witnesses, and services of a competent interpreter, if needed. The commander concerned will appoint a Judge Advocate to serve as defense counsel in additional to any other counsel of the accused person's choice. The commander concerned will notify the accused person of these rights in ample time before the trial.

(1) If the accused does not exercise the right to choose an advocate or counsel, notice to that effect will be sent through the NPWIC to the Protecting Power to permit the Protecting Power to choose counsel. If the accused and the Protecting Power fail to choose an advocate or counsel, the commander concerned shall appoint a counsel, which in normal circumstances will be the judge advocate previously appointed. The accused person must consent to the service of the appointed advocate or counsel.

(2) If requested by the accused person, the commander concerned will appoint an interpreter to assist the accused person during the preliminary hearing and the hearing in court. The interpreter must not be a trial counsel, a defense counsel, an assistant to either, a witness, or have any bias or interest in the case. Accused persons have the right to object to the interpreter appointed, and to ask for a replacement.

(3) A judge advocate will serve as defense counsel in any general or special court-martial of an EPW/RP.

g. Representatives of the Protecting Power may attend the trial. It may be decided that in the interest of security, the trial will be conducted with the public excluded. If so, a notice will be given to NPWIC at least 3 weeks before the trial opens to permit notice to the Protecting Power.

h. Two copies of the findings and the sentence, if applicable, will be forwarded immediately to NPWIC. A summary will be sent to the Protecting Power, and the detainee representative. Notice of the EPW, RP decision to use or waive the right of appeal to the Court of Appeals for the Armed Forces, when review by that court is not mandatory, will also be forwarded (in duplicate) to HQDA (DAMO-ODL) NPWIC, WASH, DC 20310-0400. NPWIC will send a copy of the decision to the Protecting Power. An EPW, RP waiver of the right to appeal will in no way affect, or change the requirement for, review by a supervisory authority, a board of review, or the U.S. Court of Military Appeals when such review is required under the UCMJ. If the sentence adjudged is death, one copy of the court-martial record of trial will be forwarded to ODCSOPS, NPWIC. NPWIC will send a copy of the record of trial to the Protecting Power. The following information will be included:

(1) A precise wording of the approved finding and sentence.

(2) A summary report of the evidence, including any preliminary investigation, elements of offenses, and any defense raised thereto.

(3) If applicable, the place where the detainee will serve confinement.

i. A sentence to confinement imposed on EPW, or RP will be served in the same type of place and under the same conditions as in the case of a member of the U.S. Armed Forces. EPW and RP sentenced to U.S. Disciplinary Barracks (USDB) or Federal penitentiaries will remain EPW/RP. Accountability requirements will be coordinated prior to any transfer by the losing confinement authority, USDB through HQDA (DAMO-ODL) NPWIC. Accused persons and the Protecting Power will be informed as soon as possible of all offenses that are punishable by the death sentence under U.S. laws. Lists of these offenses will be posted in all camps. Duplicate lists will be given to detainee representatives. Other offenses will not thereafter be made punishable by the death penalty without the concurrence of the power on which the detainee depends.

(1) An EPW or RP can be sentenced to death only if the court has taken into consideration, to the maximum extent possible, the fact that the accused is not a US citizen and is not bound to it by any duty or allegiance and is in US custody as a result of circumstances beyond their own will or control.

(2) If the death sentence is pronounced, it will not be carried out until 6 months have passed from the date the Protecting Power received the U.S. notice of the judgment and sentence.

(3) ODCSOPS will monitor and acknowledge when the ICRC/Protecting Power has received the notice terminating the execution of the sentence.

3–9. Loss or damage to property

a. Persons will be held responsible for the loss of, or damage to, any Government property through negligence or wrongful acts. A complaint may be made to the installation commander that property of a private person has been destroyed, lost, or damaged by a person interned at the installation, including any branch camp. If the EPW, RP does not accept responsibility for the damage, the commander will appoint a board of one to three officers to investigate the complaint.

b. Reports of survey or statements of charges will be processed according to AR 735-5. For this purpose, the commanding officer of an internment facility will be considered an installation commander. Amounts collected will be disposed of according to AR 735-5.

c. Supporting EPW/CI PSYOP units can assist the commanding officer in improving relations with local populations following loss or damage to private property.

3–10. Death and burial

a. For general procedures and authorized expenses for the care and disposition of remains see AR 638-30 and AR 600-8-1.

b. When EPW and RP have chosen to make a will, the original will and two certified copies will be forwarded to the supporting PWIC upon death or at their request.

c. When an EPW or RP or U.S. custody dies, the attending medical officer will immediately furnish the camp (or hospital) commander or other officer charged with their custody before death, the following information:

(1) Full name of deceased.

(2) ISN of deceased.

(3) Date, place, and cause of death.

(4) Statement that death was, or was not, the result of the deceased's own misconduct.

(5) When the cause of death is undetermined, the attending medical officer will make a statement to that effect. When the cause of death is finally determined, a supplemental report will be made.

d. The camp or hospital commander, or other officer charged with custody of the person before death, will notify the proper Branch PWIC immediately, by telegram or the most expeditious means, of the death. The data listed in subparagraph *c* above will be included. If the required data has not been determined, a supplemental report will be made as soon as possible.

e. The attending medical officer and the appropriate camp commander will complete a DA Form 2669-R (Certificate of Death). DA Form 2669-R will be reproduced locally on 8 1/2 by 11-inch paper. The form is located at the back of this regulation. This form is for the use of Army only. Enough copies of form will be made out to provide distribution as follows:

(1) Original—information center.

(2) Copy—information center (branch), if necessary.

(3) Copy—The Surgeon General.

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(4) Copy—EPW or RP personal file.

(5) The proper civil authorities responsible for recording events in the particular state if the EPW dies in the United States.

f. Investigating officer's report.

(1) The camp commander will appoint an officer to investigate and report:

(a) Each death or serious injury caused by guards or suspected to have been caused by guards or sentries, another detainee, or any other person.

(b) Each suicide or death resulting from unnatural or unknown causes.

(2) One copy of the investigating officer's report will be forwarded to the NPWIC.

(3) USACIDC special agents will investigate deaths from other than natural causes per AR 195-2. A copy of the USACIDC report of investigation, if any, will be attached to the camp commander's report.

g. Burial, record of interment, and cremation. Deceased detainees will be buried honorably in a cemetery established for them according to AR 638-30. Deceased detainees will be buried, if possible, according to the rites of their religion and customs of their military forces. Unless unavoidable circumstances require the use of collective (group or mass) graves, detainees will be buried individually. Graves Registration Services will record any later movement of the remains. The United States will also care for the ashes of cremated persons. Ashes will be kept by Graves Registration Service persons until proper disposal can be decided according to the wishes of the power on which that person depended. A body may be cremated only due to imperative hygiene reasons, the detainee's religion, or the detainee's request for cremation. When a body is cremated, this fact together with the reasons will be set forth in the death certificate.

h. Burial at sea and after land transfer. If a detainee dies at sea, the body will not be buried there unless absolutely necessary. If the body has to be buried at sea, the procedures prescribed for U.S. troops will be followed as far as possible; however, a U.S. flag will not be used. When death occurs during a land transfer, the responsible officer will follow the same procedures for burial prescribed for U.S. military personnel.

i. The personnel file of a deceased person with all pertinent records will be forwarded to the Branch PWIC.

3–11. Transfer of prisoners of war

a. General. Permanent transfer of EPW in the custody of the U.S. forces to the host nation or other allied forces requires approval of the Secretary of Defense (SECDEF). The permanent transfer of EPW to foreign national control will be governed by bilateral national agreement and in accordance with subparagraph b below following SECDEF approval. Temporary transfer of EPW/RP to accommodate surges in prisoner population beyond the immediate capability of U.S. forces to manage is authorized. Theater commanders will develop measures to ensure accountability and humane treatment of prisoners so transferred.

b. EPW/RP may only be transferred from the custody of the United States to a power which is a party to the GPW, and only after a representative of the United States has visited the Power's internment facilities and is satisfied that the Power in question is willing and able to apply the GPW. EPW/RP transfers should not increase the difficulty of repatriation. Prisoners of war during transfer will have sufficient food and drinking water to keep them in good health, and will be provided adequate clothing, shelter, and medical attention. Precautions will be taken, especially in case of transport by sea or by air, to ensure their safety during transfer. A complete list of all transferred prisoners will be made before their departure and maintained by the Branch PWIC.

c. The supporting Branch PWIC and NPWIC will be notified immediately by the EPW camp commander of any EPW or RP transferred.

d. Transfer within the territory of the detaining power will always be carried out humanely and in conditions no less favorable than those enjoyed by the troops of the detaining power during their movements. If EPW/RP are transferred on foot, only those who are fit to walk may be so transferred. The EPW/RP will not be exposed to excessive fatigue during transfer by foot.

e. The sick, wounded, or infirm EPW and RP as well as maternity cases will be evacuated through U.S. military medical channels and will remain in medical channels until they are certified "fit for normal internment" by competent medical authorities.

f. Necessary clothing, adequate shelter, and medical attention will be made available.

g. Suitable precautions will be taken to prevent EPW and RP, from escaping and to ensure their safety. Wounded and sick EPW and RP will not be transferred as long as their recovery may be endangered by the journey, unless their safety demands it.

h. The EPW and RP will be permitted to take with them their personal effects and property. The weight of their baggage may be limited if the conditions of transfer so require, but in no case will it be limited to less than 55 pounds per EPW/RP. The personal property that the EPW and RP are unable to carry will be forwarded separately.

i. The mail and parcels addressed to EPW and RP who have been transferred will be forwarded to them without delay.

j. Property, such as that used for religious services, or items donated by welfare agencies, will be forwarded as community property. These items are not to be considered a part of the 55 pounds of personal effects and property that each EPW is authorized to take.

k. When EPW and RP are to be transferred, they will be notified of their new postal addresses before departure. Notice will be given in time to pack and tag their luggage. They will also be given time to inform their next of kin and the Branch PWIC of their transfer and new address.

l. EPW and RP will not be confined in a jail or other correctional institution during transfer except in an emergency. They will be confined only in such fashion while the circumstances that necessitate the measures continue to exist. Transfer will be effected under conditions not less favorable than those under which U.S. Armed Forces are transferred.

m. Receipt of transferred EPW/RP.

(1) EPW and RP will not be accepted for detainment or transfer to U.S. Military control from outside nations without prior approval from SECDEF. EPW and RP received by transfer from an allied nation will be properly receipted for by the officer designated to accept them. The receipt will indicate the place and date the United States assumed custody and the name, grade, ISN, and nationality of each transferred EPW and RP. Three or more copies of the receipt will be prepared. The original, plus one copy, will be delivered to the commander of the camp to which the EPW and RP are assigned. Upon receiving the copies, the camp commander will forward immediately one copy directly to the Branch PWIC, or to the NPWIC if the Branch PWIC is not operational. A DA Form 4237-R or an allied equivalent form for individuals listed on the receipt should be delivered to the accepting officer at the time the transfer is effected.

(2) EPW and RP transferred between EPW facilities and hospitals will be receipted for as above when there is little chance that the EPW/RP will be returned to the original camp. When EPW and RP are transferred to hospitals outside the jurisdiction of the EPW/CI camp, the hospital commander is required to submit their strength accountability reports to the supporting branch PWIC.

(3) The use of a manifest identifying the name, rank/status, ISN, power served/nationality, and physical condition of each EPW and RP transferred and received is required. The manifest will be attached to the original receipt of transfer and forwarded to the Branch PWIC.

n. EPW and RP captured or detained by the U.S. Marine Corps, Navy, Air Force, or Coast Guard are turned over to the U.S. Army at receiving points designated by the Theater Commander.

(1) All inter-service transfers should be effected as soon as possible after initial classification and administrative processing has been accomplished.

(2) CI will only be transferred within theater, unless directed by DOD.

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(3) A manifest is required to identify as a minimum: the name, rank/status ISN (if assigned), power served/nationality, and physical condition of each EPW and RP transferred and received. The manifest will be attached to the receipt of transfer and will become a permanent record to assure accountability of each prisoner.

o. When EPW are moved to a port of debarkation from an interior point, the theater commander will provide for:

(1) Transportation of the EPW up to and including their departure from the port.

(2) Care and security of the EPW, their baggage, monies, other valuables, and records until their custody is assumed by the CONUS EPW command.

p. Transfers between Army commands. The EPW's command, with the advice of military medical authority, is authorized to transfer injured, sick, and wounded EPW to other commands.

q. Transfer of personal effects.

(1) Each EPW and retained person will be permitted to hand carry personal effects and property not to exceed 55 pounds.

(2) EPW/RP who have been serving as chaplains or clergymen during their internment will be permitted to transfer, at Government expense, an additional 110 pounds to take other religious materials with them.

r. The transfer of physically disabled, insane, mentally incompetent, or wounded EPW/RP in a theater of operations will be according to procedures set up by the Theater Commander.

s. When a railroad car other than an U.S. Military-owned or operated hospital car is used to transfer EPW or RP persons, Red Cross signs will be placed on the inside of the middle window of each side of the car and on the outside of each door window of the car. These signs will be made of white paper or cardboard with a large red cross in the center of the sign. The word "hospital" will be placed above, and the word "car" below the red cross, in black letters. When EPW/RP patients are transferred in a compartment, drawing room, bedroom, or roomette, a sign as described above, with the exception of the word "car," in proportionate dimensions will be placed on the outside of the door of the compartment, drawing room, bedroom, or roomette.

t. Theater commanders are subject to the general restrictions on transfers contained in this regulation. They may transfer injured, sick, or wounded EPW who are within their commands to or from hospitals designated by the theater surgeon or Commander, HSC with guidance from the Joint Medical Regulation Office (JMRO) or the Theater Patient Movement Requirements Center (TPMRC) if:

(1) The EPW requires prolonged hospitalization or specialized treatment, including surgery, that is not available locally.

(2) The transfer is recommended by a medical officer after an examination of the EPW.

u. When EPW no longer require hospital care, they may be returned to the command from which transferred or to an EPW camp within the receiving command.

3–12. Repatriation of sick and wounded EPW/RP

a. Sick and wounded prisoners will be processed and their eligibility determined for repatriation or accommodation in a neutral country during hostilities. Such will be according to the procedures set forth below.

(1) Sick and wounded prisoners will not be repatriated against their will during hostilities.

(2) Procedures for a Mixed Medical Commission will be established by HQDA, according to this regulation and Annex II of the GPW. The purpose of the Commission will be to determine cases eligible for repatriation. The Mixed Medical Commission will be composed of three members. Two of the members, appointed by the ICRC and approved by the parties to the conflict, will be from a neutral country. As far as possible, one of the neutral members will be a surgeon and the other a physician. The third member will be a medical officer of the U.S. Army selected by HQDA. One of the members from the neutral country will act as chairman.

b. If for any reason the use of neutral doctors cannot be arranged for by the ICRC, the United States, acting in agreement with the Protecting Power concerned, will set up a Medical Commission. This Commission will perform the duties of a Mixed Medical Commission.

c. The Mixed Medical Commission will:

(1) Examine EPW, and RP who have applied for repatriation.

(2) Inspect clinical records pertaining to these EPW.

(3) Determine those cases eligible for repatriation or hospitalization in a neutral country.

d. Decisions made by the Mixed Medical Commission will be a majority vote and cannot be changed to the detriment of the EPW and RP examined, except upon concurrence of the Commission.

e. The decisions made by the Mixed Medical Commission on all cases will be communicated to HQDA (DAMO-ODL), NPWIC, the Protecting Power, and the ICRC during the month following the Commission's visit. Each EPW and RP examined will be informed by the Mixed Medical Commission of the decision made on the case.

f. The United States will carry out the decisions of the Mixed Medical Commission as soon as possible and within 3 months of the time after it receives that notice of the decisions.

g. The U.S. member will arrange all administrative details to expedite the work of the Commission. Commanders concerned will assist, facilitate, and expedite the operations of the Commission to the fullest extent.

h. The EPW and RP noted below will be examined by the Mixed Medical Commission.

(1) EPW and RP designated by a camp or hospital surgeon or a retained physician or surgeon who is exercising the functions of the surgeon in a camp.

(2) EPW and RP whose applications are submitted by a prisoner representative.

(3) EPW and RP recommended for examination by the power on which the EPW and RP depend or by an organization duly recognized by that power and that gives assistance to them.

(4) EPW, RP who submit written requests. These EPW will not be examined until the EPW listed in (1), (2), and (3) above have been examined.

i. An EPW or RP found ineligible by the Mixed Medical Commission may apply for reexamination 3 months after the last examination.

j. Each commander will be notified before arrival of the Commission. Before arrival of the Commission at a camp, hospital, or other designated place, the commander will prepare DA Form 2670-R (Mixed Medical Commission Certificate for EPW) and update and make available the records. For each EPW and RP to be examined, DA Form 2670-R will be completed in four copies. DA Form 2670-R will be locally reproduced on 8 1/2 by 11-inch paper. This form is located at the back of this regulation. This form is for the use of Army only.

k. The commanding officers of designated hospitals will complete DA Form 2671-R (Certificate of Direct Repatriation for EPW) and forward to the Branch PWIC. DA Form 2671-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only. The certificate will be in four copies to:

(1) Make the repatriation of sick and wounded EPW, RP easier.

(2) Relieve the Mixed Medical Commission of the need to visit EPW and RP patients who are eligible for direct repatriation.

l. The following EPW and RP are eligible for direct repatriation:

(1) EPW and RP suffering from disabilities as a result of injury, loss of limb, paralysis, or other disabilities, when these disabilities are at least the loss of a hand or foot, or the equivalent.

(2) Sick or wounded EPW and RP whose conditions have become chronic to the extent that prognosis appears to preclude recovery in spite of treatment within 1 year from inception of disease or date of injury.

m. The original and one copy of DA Form 2671-R will be forwarded to ODCSOPS, NPWIC. The other two copies will be attached to the clinical record. In all instances, these records will accompany the records of the EPW or RP when transferred.

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3–13. Repatriation of other EPW/RP

Prisoners who are not sick or wounded will be repatriated or released at the cessation of hostilities as directed by OSD.

3–14. Repatriation transfer procedures

a Control and accountability of EPW and RP will be maintained until the EPW or RP is receipted for by the serving power or designated protecting power.

b The use of a manifest identifying at the minimum: name, rank/status, ISN, power served/nationality, and physical condition of each EPW and RP transferred is required. The manifest will be used as an official receipt of transfer and will become a permanent record to assure accountability of each EPW and RP until final release.

c Copies of appropriate personnel, finance, and medical records will accompany the released and/or repatriated EPW/RP. These records will be transferred to the custody of the designated official receiving the EPW/RP.

d All confiscated personal property that can be released, will accompany the released or repatriated EPW/RP. An inventory will be conducted and any discrepancies identified. The individual will sign a property receipt for his personal items.

e Upon completion of the transfer, the U.S. escort guard will forward the official receipt of transfer to the Branch PWIC.

f Upon notification from the PWIC that the transfer is complete, the losing EPW or RP internment facility will forward all official records and confiscated property that cannot be released to the Branch PWIC for final disposition.

g The PWIC will:

(1) Notify the NPWIC of final status of released/ repatriated EPW and RP.

(2) Forward all EPW and RP records and reports per AR 25-400-2, The Modern Army Recordkeeping System (MARKS).

(3) Dispose of confiscated property in their possession per instructions received from the NPWIC and applicable Army Regulations.

3–15. Retained personnel

a Enemy personnel entitled to a retained status should have on their person at the time of capture a special identity card attesting to their status. The minimum data shown on the card will be the name, date of birth, grade, and service number of the bearer. The card will state in what capacity the bearer is entitled to the protection of GPW. The card will also bear the photograph of the owner and either the signature or fingerprints or both. It will be embossed with the stamp of the military authority with which the person was serving at time of capture.

b Enemy personnel who fall within any of the following categories, are eligible to be certified as RP:

(1) Medical personnel who are members of the medical service of their armed forces.

(2) Medical personnel who are exclusively engaged in:

(a) The search for or the collection, transport, or treatment of the wounded or sick.

(b) The prevention of disease.

(c) Staffs exclusively engaged in administering medical units and establishments.

(3) Chaplains.

(4) The staff of the National Red Cross, Red Crescent, and other voluntary aid organizations. These organizations must be duly recognized and authorized by their governments. The staff of these organizations may be employed on the same duties as persons in (2) above, if such organizations are subject to military laws and regulations.

c RP whose status is certified will not be considered as EPW; however, they will receive the benefits and protection of an EPW.

d EPW who are certified to be proficient medically or religiously continue to be considered and identified as EPW, as appropriate, but will be administered and treated in the same way prescribed for RP. Enemy personnel who are classified in these categories and are determined qualified by competent Army authority are eligible to be certified as proficient to perform medical or religious duties.

(1) EPW who are ministers of religion; however, they have not officiated as chaplains to their own forces.

(2) Specially trained EPW, employed at the time of their capture as hospital orderlies, nurses, or auxiliary stretcher-bearers, in search for, or in collecting, transporting, or treating of the wounded and sick. These EPW are not eligible for RP status but may be employed only on medical duties they are qualified to perform.

e Certification of the retained status of personnel will be effected upon the decision that the special identity card held by each such person is valid and authentic. This certification will be effected, if possible, at the time of processing by the camp commander.

f The Theater Commander, or CINCUSACOM will confirm the certification of the technical proficiency of the persons described in paragraph 3-15d. Qualified U.S. Military medical and religious personnel must first confirm the medical or religious proficiency of each EPW.

g Classification forms will be completed as follows:

(1) DA Form 2672-R (Classification Questionnaire for Officer Retained Personnel) will be completed in three copies by captured officers and civilians of equal grade who have or:

(a) Claim RP status.

(b) Are applicants for a certificate of medical proficiency. DA Form 2672-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only.

(2) DA Form 2673-R (Classification Questionnaire for Enlisted Retained Personnel) will be completed in three copies by all captured enlisted persons and civilians of equal grade who have or are applicants for a certificate of medical proficiency. DA Form 2673-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only.

h The camp commander will retain one copy of each of the forms noted in subparagraph g above. The second will be forwarded to the next higher commander. The third copy will be forwarded to the Branch PWIC.

i Verifications of retained status and religious or medical proficiency will be recorded on the DA Form 4237-R of the person concerned. Denials of claims to retained status or certification of proficiency will also be recorded together with a brief statement of the reasons.

j RP are subject to the internal discipline of the camp in which they are retained; however, they may not be compelled to do any work except that relating to their medical or religious duties.

k RP, who are members of the enemy's Armed Forces, will be assigned to EPW camps. If available, they will be assigned in the ratio of two physicians, two nurses, one chaplain, and seven enlisted medical personnel per 1,000 EPW. Economy of medical staffing may be achieved at higher levels per guidance from Commanding General, HSC. As much as possible, these RP will be assigned to camps containing EPW from the same Armed Forces upon which the RP depend.

l CINCs, Task Force Commanders, Joint Task Force Commanders are authorized to transfer RP and EPW who are qualified to perform medical or religious duties between EPW camps within their jurisdiction in order to distribute them equitably.

m Subject to security requirements the theater commander will ensure:

(1) Full use of enemy medical personnel for the treatment of sick and wounded EPW/RP.

(2) Release of U.S. medical personnel, when possible, from caring for sick and wounded EPW except for supervision and training of enemy medical personnel.

n The senior medical officer in each camp will provide close and continuing supervision of the professional activities of the retained medical persons and report all improper activities.

o RP will not be allowed access to or custody of narcotic drugs or other controlled substances as delineated in Title 21, United States Code, except under close supervision of U.S. medical personnel.

p EPW camp surgeons or hospital commanders at which retained persons are used will verify:

(1) Accuracy of the final diagnosis.

(2) Adequacy of treatment.

(3) Final disposition of patients treated by RP.

q While caring for the sick and wounded, RP will receive the same daily rate of pay as is received by EPW.

r Monthly allowances for RP will be the same as those prescribed for EPW of the same rank.

s RP may be detained in EPW camps. When practical, they will be assigned quarters separate from EPW.

t RP will wear on their left sleeve a water resistant arm band bearing the distinctive emblem (Red Cross, Red Crescent) issued and stamped by the military authority of the power with which they have served. Authorized persons who do not have such armbands in their possession will be provided with Geneva Convention brassards (AR 670-1).

u RP will enjoy the same correspondence privileges as EPW. Chaplains will be free to correspond, subject to censorship, on matters about their religious duties. Correspondence may be with ecclesiastical authorities both in the country where they are retained and in the country on which they depend, and with international religious organizations. RP will be authorized the following additional privileges:

(1) They will be granted facilities necessary to provide EPW with medical care, spiritual assistance, and welfare services.

(2) They will be authorized to visit EPW periodically in branch camps and in hospitals outside the EPW camps in order to carry out their medical, spiritual, or welfare duties.

(3) They will be given the necessary means of transportation for making such visits.

(4) The senior retained medical officer, as well as chaplains, will have the right to correspond and consult with the camp commander or his or her authorized representatives on all questions about their duties.

v RP are subject to the same disciplinary measures as are EPW.

w RP will be retained only insofar as the state of health, the spiritual needs, and the number of EPW require. Persons whose retention is not required will be repatriated as soon as military requirements permit. Nothing precludes reasonable measures to prevent such persons from carrying information of strategic or tactical value. Should they come into possession of such information, their return to their own armed force may be delayed until the information is of no significant value.

3–16. Complaints and requests to camp commanders

a EPW and RP have the right to make complaints and requests to camp commanders and the ICRC/protecting powers regarding the conditions of their internment. EPW and RP may not be punished for making complaints, even if those complaints later prove unfounded. Complaints will be received in confidence, as they might endanger the safety of other detainees. Appropriate action, including segregation, will be taken to protect detainees when necessary. This policy also applies to persons who are confined pending trial or as a result of a trial.

b EPW and RP may make complaints or requests to the camp commander.

c Persons exercising the right to complain to the ICRC or protecting power about their treatment and camp may do so:

(1) By mail.

(2) In person to the visiting representatives of the ICRC or protecting power.

(3) Through their detainee representative.

d Written complaints to the protecting power will be forwarded promptly through HQDA, ODCSOPS (DAMO-ODL) NPWIC. A separate letter with the camp commander's comments will be enclosed. Military endorsements will not be placed on a detainee's communication.

e If an ICRC/protecting power communicates directly with an EPW/CI camp commander about any matter requiring an answer, the communication and commander's reply will be forwarded to HQDA, ODCSOPS (DAMO-ODL) NPWIC, for proper action.

f Any act or allegation of inhumane treatment will be investigated and, if substantiated, reported to HQDA as a Serious Incident Report (SIR) per AR 190-40. Once completed, a copy of the SIR accompanies the prisoner to the EPW/CI camp, and a copy is furnished to the monitoring Branch PWIC. All available personnel information that the EPW or RP is willing to give, will be entered on the form.

3–17. EPW/RP safety program

A safety program for EPW and RP will be set up and administered in each EPW camp. Army regulations, circulars, and pamphlets in the 385-series may be used as guides for establishing an EPW and RP safety program. Accident injury forms used in the EPW and RP safety programs will be prepared, administered, and maintained separately from those prepared for other persons included under the Army Safety Program.

Chapter 4
Employment and Compensation for EPWs

Section I
General Policy and Guidelines

4–1. General principles

a To the extent possible, EPW will be employed in work needed to construct, administer, manage, and maintain EPW camps. EPW will be employed in other essential work permitted by this regulation only when qualified civilian labor is not available. Essential work is work that must be done, despite the availability of EPW.

b EPW labor, external to DOD, is regulated by contract. When authorized by theater directives, EPW, RP may be given advance pay. Procedures for administering this advance pay are set forth in AR 37-1.

4–2. Restricted employment

a EPW will not be employed in positions that require or permit them:

(1) Access to classified defense information or records of other personnel.

(2) Access to telephone or other communication systems.

(3) Authority to command or instruct U.S. personnel.

b EPW may be employed in the following types of labor:

(1) EPW camp administration, installation, or maintenance.

(2) Agriculture.

(3) Public works, public utilities, and building operations which have no military character or purpose.

(4) Transportation and handling of stores which are not military in nature or purpose.

(5) Domestic service.

4–3. Liability to perform labor

a Subject to the limitations stated in paragraph 4-5 and 4-6, EPW will be required to perform any and all work consistent with their grade and status as follows:

(1) Officer EPW. Officer EPW will not be required to work. Officer EPW, however, may make a written request for work. The camp commander will provide such work, if feasible. Officer EPW may, at any time, revoke a voluntary request for work. Officer EPW are required to maintain their personal areas, equipment and other items/areas in a manner that promotes good health and personal hygiene.

(2) Noncommissioned officer (NCO) EPW. NCO EPW will be required to do supervisory work only. NCO EPW, however, may make a written request for work other than supervisory work. NCO

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EPW may, at any time, revoke a voluntary request for work other than supervisory work.

(3) Enlisted EPW. Enlisted EPW will be required to do any and all work consistent with this regulation.

b. Fitness of EPW for labor will be verified at least once a month by medical examination. An attending medical officer will classify the level of physical fitness EPW can perform for work as follows: heavy work, light work, and no work. Lists of these individual labor levels of EPW will be posted in each EPW camp. If physical conditions permit, each EPW will perform labor as directed by the camp commander.

4–4. Authorized work

a Categories. Levels of work for which each EPW are authorized and may be compelled to perform are categorized as follows:

(1) Restricted work. EPW may be compelled to perform the following types which may not be of a military nature or purpose:

(a) Public works and building operations. The primary factor in deciding whether EPW may be employed is the nature of the construction being undertaken. If the construction is purely military in nature, each EPW may not be compelled to engage in such work. If the construction is not purely military in nature, the purpose for which the structure is to be used is the deciding factor. If the completed construction is intended to be used primarily by units engaged in, or in direct support of, military operations against the enemy, EPW may not be compelled to work on the project.

(b) Transporting and handling stores. The first consideration is the nature of the property being handled. If the stores are military in nature, EPW may not be compelled to transport or handle them. If the items are not military in nature, then their purpose is the deciding factor. EPW may not be required to transport or handle items specifically consigned to units engaged in military operations. EPW and RP may, however, be required to handle stores when handling is incidental to the performance of authorized types of work. For example, work in a military mess may be classified as domestic service. Handling of rations by EPW in connection with domestic service may be required.

(c) Public utility services. Construction, repair, or maintenance of water, sewage, drainage, gas, or electrical facilities are not of an inherent military nature. The purpose of these services is the deciding factor as to whether or not EPW may be compelled to engage in such activities. Such services may be intended primarily or exclusively for the benefit of units engaged in, or directly supporting, operations against the enemy. If so, EPW may not be required to perform these services. On the other hand, services intended primarily or exclusively for other purposes represent work that EPW may be compelled to perform.

(2) Nonrestricted work. EPW may be compelled to perform types of work listed below having no direct military purpose.

(a) Construction, administration, management, and maintenance of EPW camps.

(b) Agriculture.

(c) Manufacturing industries, with the exception of metallurgical, machinery, and chemical industries.

(d) Commercial business and arts and crafts.

(e) Domestic service, including a clothing repair shop, laundry, bakery, or a mess hall.

4–5. Unauthorized work

a Unhealthy or dangerous work. EPW and RP may not be employed in any job considered injurious to health or dangerous because of the inherent nature of the work, the conditions under which it is performed, or the person's physical unfitness or lack of technical skill. A specific task should be considered, not the industry as a whole. The specific conditions for each job are the deciding factors. For example, an otherwise dangerous task may be rendered safe by the use of safety equipment. Likewise, an otherwise safe job may be dangerous because of the circumstances under which the work is required to be done. Similarly, dangerous work may be safe for those whose training and experience have made them accustomed to it. EPW will not be employed in tasks requiring:

(1) Exertion beyond physical capacity.

(2) Use of inherently dangerous mechanisms or materials such as:

(a) explosives or mine removal.

(b) Mechanisms that are dangerous because the person is unskilled in their use.

(3) Climbing to dangerous heights or exposure to risk of injury from falling objects under motion and not under full control.

b. Humiliating work. No person will be assigned labor that is humiliating or degrading for a member of the U.S. Armed Forces. This prohibition does not prevent EPW from doing ordinary and frequently unpleasant tasks such as maintaining sanitation facilities, ditch digging and manual labor in agriculture.

c. Other specifically prohibited work. Certain occupations or types of work are prohibited for safety, security, or other reasons. EPW and RP will not be:

(1) Permitted to work in an area where they may be exposed to combat zone fire.

(2) Employed as personal servants to members of the U.S. Armed Forces.

(3) Employed to tend bars or serve alcoholic beverages in officers' messes or similar establishments.

(4) Permitted to work inside correctional facility walls or near inmates.

d. Questionable work. In case of doubt as to whether certain work is authorized, the next higher HQ Staff Judge Advocate (SJA) will review the proposed tasks. The purpose of the review will be to ensure consistency with this regulation and the law of war. The SJA will provide recommendations in writing to the camp commander. A copy will be forwarded to HQDA (DAJA-IA), WASH DC 20310-2214.

4–6. Decisions on work conditions and safeguards

Commanders will make on-the-job decisions as to whether work is safe. They will take into account the guidance set forth in this regulation. Commanders will make decisions by ordinary standards of sound judgment, assisted by the informed advice of persons familiar with the occupations and other available data. Data will include the opinions of the SJA. Preliminary job training will be given when necessary and; protective clothing and accessories will be provided as required (e.g., hard-toed shoes, goggles, and gloves). Such safety devices will be equal to safeguards provided for civilian labor. Commanders will make periodic inspections to ensure satisfactory conditions and safeguards are maintained at all times.

4–7. Referrals to HQDA, ODCSOPS

a. When substantial doubt exists as to whether or not a type of work is permissible according to this regulation, a request to ODCSOPS for specific instructions will be made through channels by the most expeditious means.

b Each question forwarded will be accompanied by a statement as to:

(1) Type and place of work.

(2) Tasks to be performed.

(3) Number of EPW to be employed.

(4) Other facts having a direct bearing on the employment.

4–8. Length of workday

a The length of the workday for EPW, including the time for travel will not exceed that permitted for civilians in the locale who are employed in the same general type of work. The working period may be extended but will not be considered excessive because EPW are laboring under a task system. EPW contracts will contain specific terms on the hours of employment.

b Except as provided in subparagraph *c* below, the EPW will not be required to work more than 10 hours (in one day) exclusive of a one hour lunch and rest period. They will not be kept out of camp for more than 12 consecutive hours, including travel time. Rest

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cycles consistent with the wet bulb, black globe temperature will be monitored and followed.

c EPW may be required to work any number of hours for the efficient operation of the EPW compound messes. EPW are responsible for preparing food within these messes.

4–9. Rest periods

a. Day of rest. Each EPW will be allowed a rest period of 24 consecutive hours every week. These hours will preferably be on Sunday or on the day of rest in the prisoner's country of origin or as established by his or her religious affiliation.

b Annual. Each EPW who has worked for one full year will be given a rest of eight consecutive days during which the U.S. will give working pay to the EPW.

4–10. Responsibility for work supervision

The EPW camp commander will:

(1) Decide, as far as practical, how adequate the technical supervision is which is provided by the using agency.

(2) Report the facts on inadequately supervised details to the using agency.

(3) Refuse to continue details on contract work unless adequate work supervision is provided.

4–11. Work detail leaders and interpreters

EPW camp commanders are authorized to use selected EPW as work detail leaders and interpreters. The time of work detail leaders and interpreters will be included in labor reports under the same project work classification as their details. The supporting EPW/CI PSYOP unit can assist the camp commander in identifying key communicators, informal leaders, and linguists among the camp population for use as work detail leaders and interpreters.

4–12. Task system

The task system will be used when it is possible to predetermine the amount of finished work that an EPW, or group of EPW, can reasonably be expected to complete in a specific period of time.

a Elements of the task system. The task system consists of:

(1) Assigning each EPW, or each group of EPW, a definite and reasonable amount of work to be completed within each workday or other predetermined time period.

(2) Payment for completed work according to this regulation.

(3) Incentive adjustments of the required work according to this regulation.

(4) Penalty measures needed to enforce the task system.

b Decision on daily tasks. The camp commander will decide the reasonable amount of completed work to be required of each EPW or group of EPW during a day.

c Notice to EPW. EPW will be informed of the adoption of the task system before it is put into effect. Each EPW or group of EPW, depending upon whether separate or group tasks are assigned, will be informed of the amount of completed work required each day.

d Incentives. As an incentive, EPW who have completed the required amount of work in less than normal time may be returned to quarters.

e Enforcing the task systems. The camp commander may take disciplinary action against physically qualified EPW who habitually fail to complete the assigned tasks.

4–13. Employing EPW

a The greatest benefit from EPW labor or work projects will be obtained. EPW will be employed, as far as practical, on work for which they are qualified. The Dictionary of Occupational Titles, U.S. Government Printing Office, WASH, DC, will be used as a guide in deciding the qualifications of each EPW.

b In assigning EPW to details requiring special training and skills, the following qualification will be considered.

(1) Technical skills.

(2) Aptitudes.

(3) Past work records.

(4) On-the-job training.

c EPW capable of performing skilled and semi-skilled work should be employed on essential work. Persons on work details that require special training or skill will remain as constant as practical. When it is necessary to substitute an EPW in such a detail, the using agency will be notified.

4–14. Paid work

EPW will be compensated for: performing work for which pay is authorized. The rate of such pay shall be not less than as prescribed in Article 62, GPW. Compensation for all such work will be made as authorized from U.S. Army appropriated funds, canteen funds, or camp EPW funds. Types of paid work for which compensation is authorized are:

a Labor performed for a contract employer or for a Federal agency.

b Services as orderlies and cooks (for officer EPW).

c Services to construct, administer, manage, and maintain EPW camps, branch camps, and hospitals when such services are performed by EPW permanently assigned to certain duties or occupations.

d. Labor of RP for their duties.

e. Spiritual or medical duties required to be performed by EPW for fellow EPW.

f Service as prisoner representative or assistant. Such persons will be paid from the camp EPW fund. If no such fund exists, they will be paid the prescribed rate of pay from U.S. Army appropriated funds.

g Work as detail leaders or interpreters.

4–15. Restriction on paid work

a. Mess personnel. The number of EPW cooks and assistant cooks who will be paid for work in camp messes will in no case exceed the total number authorized for Army enlisted messes of the same or similar size.

b. Fatigue details. Kitchen police, latrine orderlies, and other fatigue details will normally be provided by rotating enlisted EPW. Each EPW assigned to these details will not be paid from Government canteen or camp EPW funds. Assignment of persons to such details by rotation on a duty roster may interfere with the work program. If so, the Camp Commander may assign these duties to EPW who volunteer and whose skills or training are not essential for other work details. In such cases, EPW assigned may be paid the authorized daily rate from canteen credits contributed by all EPW. Payment will be under supervision of the Camp Commander.

c. Gardening work.

(1) To the extent practical, EPW will be required to raise their own vegetables. This work will be classified as paid work.

(2) The produce from gardens operated with EPW labor will be U.S. property. It will be used for the benefit of EPW and U.S. Armed Forces personnel. It should not be sold or traded in civilian markets.

4–16. Rates for paid work

EPW employed for paid work will be compensated at a rate to be specified, on either piecework or by the workday, as provided below.

a Piecework rates. Piecework rates will be used in compensating EPW when the work performed is for a contract employer or a Federal agency other than DOD.

b Working rates. Working rates will be used for compensating all other paid work (other than contract work) as follows:

(1) EPW of all grades, whether acting in a supervisory capacity or otherwise, will be compensated at the authorized daily rate per full workday.

(2) EPW laboring less than the full workday will be compensated in proportion to the number of hours worked, except when working under a task system and having completed the required task, EPW working under a task system will be paid only for the completed parts of the task despite the number of hours worked.

(3) The U.S. work supervisor may decide that an EPW who is not under a task system is producing less than should be produced

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is a full workday. If so, the EPW will be compensated at a rate proportionately lower than the authorized daily rate. Such a decision must be approved by the Camp Commander.

4–17. Days of paid work per month
The maximum number of days of paid work for an EPW will be limited to the number of workdays in a calendar month. The total workdays include the total number of days minus Sunday and any holiday specifically authorized by HQDA, ODCSOPS, (DAMO-ODL) NPWIC.

4–18. Unpaid work
EPW/RP will not be paid for those services connected with administering and maintaining EPW camps, branch camps, and hospitals when such services are performed on a daily rotation or other temporary basis. Unpaid work, in all cases, will include:
a. Kitchen police.
b. Latrine orderlies.
c. Ground police.
d. Other routine fatigue details of the types normally assigned and performed equitably and temporarily by persons in U.S. Army units.

4–19. Sale of articles and repair services
The canteen officer may sell articles made to order for, or repair services performed for, U.S. personnel by EPW. This sale is subject to the following provisions:
a. Articles will be manufactured or repair services will be performed only during the spare time of EPW.
b. No expense to the U.S. will be incurred for equipment, materials, or labor.
c. Repair work or the making of articles to order for U.S. personnel will be prohibited unless an order for the work is placed through the EPW canteen.
d. The canteen officer will fix the price of each article or repair service. The price will reasonably conform to prices for similar articles or services in the civilian market, less the cost of any material supplied by the customer.
e. The canteen officer and the Camp Commander will enter into a blanket contract. Under this contract, the canteen officer will pay to the Camp Commander amounts derived from the sale of articles made to order for, and repair service performed for, U.S. personnel, less a handling charge by the canteen of not more than 10 percent. The canteen officer will submit a voucher monthly to the camp commander. The voucher will list:
(1) The individual sales and services performed during the month.
(2) The price charged for each.
(3) The deductions made for handling charges.
f. The Camp Commander will deposit the amount derived from the sale of articles made to order for, or repair services performed for, U.S. personnel with the U.S. Treasurer. Procedures for these transactions are prescribed in AR 37-1. The EPW will be paid an hourly rate. The rate will not exceed the authorized daily rate for paid work for the services performed. However, in no case will the amount paid to the EPW exceed the price of the article or repair service fixed under subparagraph *d* above. Amounts will be subject to deductions provided for in this regulation. Any residual money will be disbursed by the EPW camp council for use by camp EPW. This disbursement must be approved by the Camp Commander.

4–20. Disability compensation
a. An EPW may be injured or suffer a disability while working under circumstances that may be attributed to work. If so, DA Form 2675-R (Certificate of Work Incurred Injury or Disability) will be completed in four copies. The original will be given to the EPW, the second copy will be forwarded to the PWIC to be sent to the National Prisoner of War Information Center, and the third and fourth will be placed in the EPW's personnel file.

b. A claim by the EPW for compensation for work-incurred injury or disability will be forwarded to the PWIC. The PWIC will send the claim to the Power on which the EPW depends for settlement. A copy of the completed DA Form 2675-R taken from the personnel files of the EPW will be attached to the claim. DA Form 2675-R will be reproduced locally on 8 1/2 by 11 inch paper. This form is for the use of Army only.

4–21. Operation of government vehicles
EPW may be licensed to operate Government motor vehicles according to AR 600-55.

Section II
Contract Employment

4–22. Rules and procedures
Rules and procedures governing the military and contract employment of EPW will be according to the most current contract laws, procedures and guidelines and comply with the provisions of the Geneva Convention. All requests for the contracting of EPW will be forwarded promptly through channels to HQDA, ODCSOPS (DAMO-ODL) and be coordinated with HQDA, DAJA.

Chapter 5
Beginning of Internment (CI)

5–1. General protection policy—civilian internee
a. Treatment.
(1) No form of physical torture or moral coercion will be exercised against the CI. This provision does not constitute a prohibition against the use of minimum force necessary to effect compliance with measures authorized or directed by these regulations.
(2) In all circumstances, the CI will be treated with respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs. At all times the CI will be humanely treated and protected against all acts of violence or threats and insults and public curiosity. In all official cases they will be entitled to a fair and regular trial as prescribed by this regulation.
(3) The CI will be especially protected against all acts of violence, insults, public curiosity, bodily injury, reprisals of any kind, sexual attack such as rape, forced prostitution, or any form of indecent assault.
(4) The CI will be treated with the same consideration and without adverse distinction based on race, religion, political opinion, sex, or age.
(5) The CI will be entitled to apply for assistance to the protecting powers, the International Committee of the Red Cross, approved religious organizations, relief societies, and any other organizations that can assist the CI. The commander will grant these organizations the necessary facilities to enable them to assist the CI within the limits of military and security considerations.
(6) The following acts are specifically prohibited.
(a) Any measure of such character as to cause the physical suffering or extermination of the CI. This prohibition applies not only to murder, torture, corporal punishment, mutilation, and medical or scientific experiments, but also to any other measure of brutality.
(b) Punishment of the CI for an offense they did not personally commit.
(c) Collective penalties and all measures of intimidation and terrorism against the CI.
(d) Reprisals against the CI and their property.
(e) The taking and holding of the CI as hostages.
(f) Deportations from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited.
b. Authorization to intern. Internment of protected civilian persons in a CI camp is authorized and directed provided that such persons satisfy the requirements for being accorded the status of CI. One of the following two conditions must apply:
(1) Internment has been determined by competent U.S. Military authority to be necessary for imperative reasons of security in the United States Armed Forces in the occupied territory.
(2) Internment has been directed by a properly constituted U.S. military court sitting in the occupied territory as the sentence for conviction of an offense in violation of penal provisions issued by the occupying U.S. Armed Forces.
c. Order for internment.
(1) A protected civilian person in occupied territory will be accepted for evacuation to, and/or for internment in, a CI camp only on receipt of one of the following:
(a) An internment order for imperative security reasons authenticated by a responsible commissioned officer of the United States Military specifically delegated such authority by the theater commander.
(b) An order of an authorized commander approving and ordering the execution a sentence to internment pronounced by a properly constituted U.S. military court sitting in the occupied territory.
(2) The internment order will contain, as a minimum, the following information:
(a) The internee's personal data to include full name, home address, and identification document number, if any.
(b) A brief statement of the reason for internment.
(c) Authentication to include the signature of the authenticating officer over his or her typed name, grade, service number, and organization.
d. Compassionate internment. Notwithstanding the provisions of b and c above, requests by the CI for the compassionate internment of their dependent children who are at liberty without parental care in the occupied territory will normally be granted when both parents or the only surviving parent is interned.
e. Spies and saboteurs.
(1) As individually determined by the theater commander, protected civilian persons who are detained as alleged spies or saboteurs or as persons under definite suspicion of activities hostile to the security of the United States or an occupying power, will be regarded as having forfeited rights of communication with the outside world under the Geneva Convention (GC) for reasons of military security. Such forfeiture will be viewed as an exceptional and temporary measure. Due to the seriousness of the charges, such persons will not be processed as ordinary CI.
(2) Suspected spies and saboteurs will be afforded the same human rights treatment as the CI, and in case of trial, will be accorded the rights of fair and regular trial prescribed by the GC and by this regulation.
(3) When by the direction of the theater commander, suspected spies and saboteurs rights of communication with the outside world have been restored, their internment in a CI camp may be covered in accordance with the provisions stated in paragraphs b and c above. When so interned, they will be accorded full CI status and rights and privileges as provided for by these regulations.
(4) At the earliest date consistent with the security of the United States, they will be released and granted full rights and privileges as protected persons under the GC.
f. Custodial security. The degree of security and control exercised over the CI will reflect the conditions under which their internment is authorized and directed and will recognize the escape hazards and difficulties of apprehension attendant on the internment of the CI in the occupied territory.
g. Appeals and periodic review of security internment cases.
(1) *Appeals.* The CI who are interned for imperative security reasons will be accorded the right to appeal the order directing their internment. Such appeals will be decided with the least possible delay by a board of officers. Appeals will be decided only on the grounds of the existence or nonexistence of imperative security reasons requiring the internment of the protected person.
(2) *Periodic review.* In the case where an appeal has been rejected, the board will review the case at least every 6 months, if possible, to determine whether continued internment is essential to the security of the U.S. Armed Forces.
(3) *Reclassification as assigned residence.* In each CI case reviewed by the board in which continued control is necessary, the CI will be considered for an assignment to a residence in an area where there is adequate control.
h. *Support of dependents.* The United States will financially support the CI's dependents who are at liberty in the occupied territory and are without adequate means of support or are unable to earn a living.

5–2. Civilian Internee Safety Program
a. *Establishment.* A safety program for the CI will be established and administered in accordance with the policies prescribed in AR 385-10 and other pertinent safety directives.
b. *Reports and records.* DA forms and procedures outlined in AR 385-40 will be used in the implementation of the CI safety program. When so used, the letters "CI" will be clearly stamped at the top and bottom of each form. All such forms will be prepared, administered, and maintained separately from those prepared for personnel included under the Army Safety Program.

5–3. Republic of Korea/United States Agreement on processing civilian internees in Korea
a. On 12 February 1982, the United States and Korea signed The Memorandum of Agreement for the Transfer of the CI. The agreement applies to both the Republic of Korea (ROK) Armed Forces and the United States Armed Forces in Korea (USFK) who handle the CI.
b. As a result of this agreement, USFK Regulation 190-6 reflects minor modifications to procedures and forms concerning the processing of CI applicable only to the Korean theater of operations.

Chapter 6
Administration and Operation of CI Internment Facilities

6–1. Internment Facility
a. *Location.* The theater commander will be responsible for the location of the CI internment facilities within his or her command. The CI retained temporarily in an unhealthy area or where the climate is harmful to their health will be removed to a more suitable place of internment as soon as possible.
b. *Quarters.* Adequate shelters to ensure protection against air bombardments and other hazards of war will be provided and precautions against fire will be taken at each CI camp and branch camp.
(1) All necessary and possible measures will be taken to ensure that CI shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigors of the climate and the effects of war. In no case shall permanent places of internment be placed in unhealthy areas, or in districts the climate of which is injurious to CI.
(2) The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex and state of health of the internees.
(3) Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal hygiene and for washing their personal laundry; installations and facilities necessary for this purpose shall be provided. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.
(4) CI shall be administered and housed separately from EPW/

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RP. Except in the case of families, female ☐ shall be housed in separate quarters and shall be under the direct supervision of women.

c. Marking. Whenever military considerations permit, internment facilities will be marked with the letters "☐" placed so as to be clearly visible in the daytime from the air. Only internment facilities for the ☐ will be so marked.

d. Organizations and operation.

(1) The ☐ internment facilities will be organized and operated, so far as possible, as other military commands.

(2) A U.S. Military commissioned officer will command each ☐ internment facility.

(3) When possible, the ☐ will be interned in ☐ camps according to their nationality, language, and customs. All ☐ who are nationals of the same country will not be separated merely because they speak different languages.

(4) Complete segregation of female and male ☐ will be maintained except—

(a) When possible, members of the same family, particularly parents and children, will be lodged together and will have facilities for leading a normal family life.

(b) A parent with children, if single or married without spouse, will be provided quarters separate from those for single persons.

(c) ☐ may be searched for security purposes. Female ☐ may be searched only by female personnel.

6–2. Administrative processing

a. Military police processing.

(1) Military Police (MP) prisoner of war units officially establish ☐ status and processes the ☐.

(2) Only civilian persons entitled to protected status and that meet the requirements set forth in the GC will be classified as a ☐.

(3) Dependent children, who are interned for compassionate reasons with their parents, will not be classified as ☐ or otherwise processed except as required on DA Form 2674-R (Enemy Prisoner of War/Civilian Internee Strength Report) (RCS CSCP-1583) and DA Form 2663-R. DA Form 2674-R will be reproduced locally on 8 1/2 by 11 inch paper, head to head. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only. Children under the age of twelve are to be identified by the wearing of some form of identity badge or wristband or some other means of identification.

(4) All efforts will be made to take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources.

b. DA Form 2674-R.

(1) General. DA Form 2674-R will be prepared for each ☐ camp and hospital to which ☐ are assigned. Preparation will be in accordance with applicable procedures set forth for EPWs. DA Form 2674-R will be reproduced locally on 8 1/2 by 11-inch paper, head to head. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only.

(2) Personnel to be accounted for. All civilians processed and classified as ☐ and for whom a DA Form 4237-R has been prepared in accordance with paragraph 6-2, of this regulation and dependent children for whom compassionate internment with their ☐ parents has been approved in accordance with procedures prescribed by the theater commander.

(3) Basic personnel data. References to entries in section B, Returns, requiring basic personnel data, will be interpreted as follows.

(a) Name. Enter last names and first names, in that order, alphabetically according to section (assigned game, losses, and so forth) of ☐ and dependent children.

(b) Internment serial number. Enter complete serial number of this regulation (dependent children are not assigned internment serial numbers (ISNs)).

(c) Grade. Civilian capacity or title, ☐ only.

(d) Sex. ☐ and dependent children.

(e) Nationality. ☐ and dependent children. Enter name of country of which persons claim citizenship.

(f) Occupational skill. Applies only to ☐.

(4) Remarks column. On initial entry, enter in the "remarks" column the notation "approved by" (insert appropriate headquarters) on (insert date approved) ☐ and dependent children.

c. Civilian internee personnel record.

(1) DA Form 4237-R will be prepared for each protected civilian processed in an occupied territory as a ☐ or dependent child.

(2) All pertinent information available or which the ☐ is willing to give will be entered on the form. If a ☐ refuses or is unable to give any items of information, a notation will be made in item 36 on DA Form 4237-R. The codes to be used are contained in the Prisoner of War Information System (PWIS) Operator's Manual. Stamp the letters "☐" at the top and bottom of all pages of the form.

(3) All items on DA Form 4237-R are self explanatory except the following entries.

(a) Item 3. Civilian capacity or title (for example, mayor or police chief) if appropriate.

(b) Item 4. Serial number of identification document, if any.

(c) Item 5. Entry of "civilian internee."

(d) Items 19 through 21. Not applicable.

(e) Items 23 through 25. Name of apprehending unit and location, if known.

(f) Item 35. List impounded items from DA Form 1132 (Prisoner's Personal Property List, Personal Deposit Fund) and have the ☐ sign in the appropriate space verifying the impounded items.

(4) Entries will be typed if possible; otherwise, the form will be printed by hand in BLOCK LETTERS.

(5) Once completed, a copy of the form will accompany the ☐ to the ☐ camp. A copy will be furnished to the Branch PWIC monitoring ☐ activity for the theater commander.

d. Internment serial number (ISN). ISNs for each ☐ will be assigned according to the procedure set forth for EPW. The letters A☐@ will be substituted for AEPW@ e.g. US9AB-0001☐.

e. DA Form 2677-R (Civilian Internee Identity Card). Each ☐ will be issued a completed DA Form 2677-R. Notation thereof will be made under item 36 of DA Form 4237-R. DA Form 2677-R will be reproduced locally on 3- by 5- inch card head to foot. (Copy for local reproduction is located at the back of this regulation.) This form is for the use of Army only. All cards will be weatherproof. The ☐ will retain their identity cards at all times.

f. Internment card. On completion of a DA Form 4237-R, but not later than one week after arrival at a ☐ camp, each ☐ must complete two copies of DA Form 2678-R (Civilian Internee Notification of Address). One copy will be addressed to the EPW/☐ information organization and the other copy to a relative or next-of-kin. DA Form 2678-R will be reproduced locally on 4- by 6-inch card, printed head to foot. (Copy for local reproduction is located at the back of this regulation.)

g. DA Form 2663-R. DA Form 2663-R will be completed in duplicate for each ☐ and for each interned dependent child. One copy will be retained at the camp at which the ☐ or dependent child is interned and will accompany internee on transfers; the other copy will be forwarded to the Branch PWIC.

6–3. Personal effects

a. All personal effects, including money and other valuables, of the ☐ will be safeguarded. Personal effects are classified according to their disposition.

b. The personal effects that detainees are allowed to retain, but are taken from them temporarily for intelligence purposes, will be receipted for and returned as soon as practical. Any national identification card or DA Form 2677-R will not be taken from the ☐ at any time.

(1) The camp commander may receive personal effects that the ☐ are permitted to retain, but which they wish stored. Individual receipts will be given to the ☐ for all items stored in this manner.

(2) Any claims by a ☐ for compensation for personal effects, money, or valuables stored or impounded by the United States and not returned upon repatriation or any loss alleged to be the fault of the United States or its agents will be referred to the country to which the ☐ owes allegiance. In all cases, camp commanders will provide the ☐ with a statement, signed by a responsible officer, describing the property not returned and the reason. A copy of this statement will be forwarded to the Branch PWIC.

c. An inventory of personal effects that have been impounded will be entered on DA Form 4237-R, item 35. Also, DA Form 1132 will be completed by the ☐ and signed by the officer in charge or his or her authorized representative and a copy given to the ☐.

d. The commanding officer of the camp where the ☐ is interned will be responsible for storing and safekeeping impounded personal effects. Such property will be marked or otherwise identified and securely bound or packaged. Upon transfer, the ☐'s impounded property will be delivered to the commanding officer of the receiving facility.

e. Money found in the possession of the ☐ will be handled according to AR 37-1.

f. Confiscated items of economic value will be receipted to the proper agency. Items of intelligence interest will be brought to the attention of military intelligence personnel immediately and receipted to them.

g. Personal property and documents of importance to the next-of-kin left by a ☐ who has been released, has died, or has been in an escaped status in excess of 30 days, will be forwarded to the Branch PWIC in sealed parcels. The parcels will be accompanied by statements identifying the ☐ and listing the contents. All parcels will be receipted for by the authorized losing or gaining facility representative.

h. The theater commander will be responsible for retaining and storing other personal effects, pending final disposition instructions from HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

6–4. Internee Committee

a. Election. At each camp and branch camp, ☐ will be elected by secret written ballot to the Internee Committee. This committee is empowered to represent the camp to the protecting powers, International Committee of the Red Cross, or other authorized relief or aid organizations and U.S. military authorities.

b. Composition. The Internee Committee will consist of not less than two and not more than three elected members. Elections will be held every 6 months or upon the existence of a vacancy. Committee members are eligible for re-election.

c. Approval. Each member of the Internee Committee will be approved by the camp commander prior to assumption of duty. If the camp commander refuses to approve or dismisses an elected member, a notice to that effect with the reasons for refusal or dismissal will be forwarded through channels to the Branch PWIC for transmittal to the protecting power with a copy furnished to NPWIC.

d. Assistants. Each member of the Internee Committee may have an assistant to act as an interpreter. The interpreter must be approved by the camp commander.

e. Duties.

(1) The Internee Committee will be responsible for furthering the physical, spiritual, and intellectual well being of the ☐. Members will not be required to perform any other work if it interferes with their duties.

(2) Any mutual assistance organization set up by the ☐ will be under the jurisdiction of the Internee Committee.

(3) Internee Committee members will be provided with the necessary materials, facilities, and transportation and will be given the freedom required to accomplish their duties. Additional special duties performed by members of an Internee Committee include the following:

(a) Visits to outside labor details.

(b) Checking the management of the canteen and the canteen fund.

(c) The presentation and transmittal of petitions and complaints to the appropriate authorities.

(d) The distribution and disposition of collective relief shipments.

(e) Keeping informed of ongoing and final judicial proceedings instituted against a ☐ whom they represent.

(f) The delivery of perishable goods to the infirmary when addressed to a ☐ undergoing disciplinary punishment.

(g) Representing the interest of the ☐ by ensuring the transport of their community property and luggage that they are unable to take with them on transfers because of baggage weight limitations.

(4) Members of Internee Committees who are transferred will be allowed a reasonable time to acquaint their successors with their duties and related current ☐ affairs.

f. Communications facilities. Members of the Internee Committee will be accorded postal and telegraphic facilities for communicating with the protecting powers, International Committee of the Red Cross and its delegates, or other relief and aid organizations authorized to assist the ☐ and U.S. military authorities. Committee members of branch internment camps will be accorded similar facilities for communicating with the Internee Committee of the parent ☐ camp. These communications will be unlimited and will not be considered as forming a part of the correspondence quota outlined in paragraph 6-8.

6–5. Supplies

a. General.

(1) The ☐ must provide their own clothing and footwear. Approved items of clothing and equipment, general supplies, automotive, and fuel will be supplied upon requisition.

(2) Except for work clothing or as circumstances warrant, or climatic conditions required, no replacement clothing will be issued.

(3) Except for hats and other accessories any item of clothing that may be worn as outer garments will be marked as prescribed below:

(a) All shirts, undershirts, blouses, jackets, coats including overcoats and raincoats, and similar articles will be marked with the letters "☐" across the back and on the front of each sleeve between the elbow and shoulder. The letters will be black and 4 inches high. If the clothing or uniforms are of such color that black letters do not contrast well, white will be used.

(b) Trousers, walking shorts, and like items of clothing will be similarly marked with the same letters across the back just below the belt and on the front of both legs just above the knees.

(c) At the discretion of the camp commander, the ISN or other identification marks may be written or stamped on the inside of all ☐ clothing.

b. Food.

(1) Subsistence for the ☐ will be issued on the basis of a master ☐ menu prepared by the theater commander. Preparation of the menu will include the following:

(a) The daily individual food ration will be sufficient in quantity, quality, and variety to maintain the ☐ in good health and to prevent nutritional deficiencies.

(b) The customary diet of the ☐ will be considered.

(c) The ☐ performing physical labor will receive additional food in proportion to the kind of labor performed.

(d) Expectant and nursing mothers and children under 15 years of age will receive additional food in proportion to their physiological needs.

(2) Facilities will be available to the ☐ for preparing additional food received or procured by them from authorized sources.

c. Miscellaneous.

(1) The issuance of expendable supplies is authorized according to allowances prescribed in Army publications.

(2) Equipment required to support vocational training projects such as gardening, carpentry, cobbling, blacksmithing, masonry, repairing shoes and clothing, tailoring, barbering, printing, and farming may be requisitioned through normal supply channels. Subject to restrictions imposed on authorized expenditures from the camp Civilian Internee Fund, camp commanders may purchase locally items of equipment, materials, and supplies needed in the vocational training program that are not available through supply channels.

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6–6. Medical Care and Sanitation

a General.

(1) Dental, surgical, and medical treatment will be furnished free to the CI.

(2) A medical officer will examine each CI upon arrival at a camp and monthly thereafter. The CI will not be admitted into the general population until medical fitness is determined. These examinations will detect various infestations and communicable diseases especially tuberculosis, malaria, and venereal diseases. They will also determine the state of health, nutrition, and cleanliness of each CI. During these examinations, each CI will be weighed, and the weight will be recorded on DA Form 2664-R.

(3) Each CI will be immunized or reimmunized as prescribed by theater policy.

b CI medical personnel.

(1) Qualified CI medical personnel will be used as much as possible in medical and hygiene work necessary for the well-being of all CI.

(2) Required Army medical personnel will be provided within the capability of the theater commander.

c. Medical facilities. Each CI camp will provide personnel, material, and facilities for adequate routine and emergency dispensary treatment. Persons requiring hospital treatment will be moved, if feasible, to a civilian hospital. The treatment must be as good as that provided for the general population. When civilian hospital facilities are not available or their use is not feasible due to security considerations, U.S. military hospital facilities may be used. Guards for hospitalized CI will be provided, as necessary.

d. Medical care.

(1) Medical and dental care, including dentures, spectacles, and other required artificial appliances, will be provided the CI in accordance with AR 40-3.

(2) Each CI will be given an initial radioscopic chest examination. If active disease is found, pulmonary disease consultation is indicated. If no active disease is found, the individual will be followed through routine periodic examinations.

(3) For children up to 14 years of age, a tuberculin skin test (TST) will be administered. No chest x-ray is necessary if the TST is negative. The local medical officer will establish guidance for subsequent tests based on the tuberculosis experience of the population. Routine annual tuberculin testing of children is not warranted unless there is clear-cut evidence of high risk. (See AR 40-26, para 8–1.)

(4) Experimental research will not be conducted on the CI even if the CI agrees to it.

(5) Sick call for the CI desiring medical attention will be held each day. Emergency treatment will be provided at all times.

e Blood donations. At each CI camp and hospital, a list will be maintained according to blood types of CI who have volunteered to furnish blood.

f. Records and reports.

(1) General. The medical records and forms used for the hospitalization and treatment of U.S. Army personnel and for EPWs will be used for CI. The letters "CI" will be stamped at the top of the form. Medical and dental records will accompany the CI when they are transferred.

(2) Certificate of Wars Incurred Injury or Disability. If a CI is injured while working or incurs a disability that may be attributed to work, a DA Form 2675-R will be completed.

(3) Certificate of medical treatment. Each CI who has undergone medical treatment will be given or request an official certificate indicating the nature of his or her illness or injury, and the duration and kind of treatment given. A duplicate of this certificate will be forwarded to the Branch PWIC.

(4) Seriously ill report. When a CI is seriously ill because of injury or disease, the camp or hospital commander will notify the Branch PWIC without delay and provide a brief diagnosis of the case. Follow-up reports, including notification of removal from the seriously ill list, will be submitted each week thereafter during the period the CI remains critical.

g. Sanitation.

(1) Hygiene and sanitation measures will conform to those prescribed in AR 40-5 and related regulations. Camp commanders will conduct periodic and detailed sanitary inspections.

(2) A detailed sanitary order meeting the specific needs of each CI camp or branch camp will be published by the CI camp commander. Copies will be reproduced in a language that the CI understands and will be posted in each compound.

(3) Each CI will be provided with sanitary supplies, service, and facilities necessary for their personal cleanliness and sanitation. Separate sanitary facilities will be provided for each sex.

(4) All CI will have at their disposal, day and night, latrine facilities conforming to sanitary rules of the Army.

6–7. Social, Intellectual, and Religious activities

a General.

(1) Subject to security connections and camp discipline, the CI will be encouraged, but not required, to participate in social, intellectual, religious, and recreational activities. Introducing political overtones into or furthering enemy propaganda objectives through these activities will not be tolerated.

(2) Premises and facilities for conducting the activities in (1) above will be made available in each camp, if possible. Required materials and supplies will be requisitioned through normal supply channels.

(3) Carefully selected and qualified civilian nationals and CI may be used for the conducting of activities in (1) above where practical as long as they are closely supervised by U.S. Military personnel.

b Visits.

(1) Official. Duly accredited representatives of the protecting powers and of the International Committee of the Red Cross and other will be permitted to visit and inspect CI camps and other places of internment in the discharge of their official duties. The inspections will be at times previously authorized by the theater commander. Such visits will not be prohibited, nor will their duration and frequency be restricted, except for reasons of imperative military necessity, and then only as a temporary measure. These representatives will be permitted to—

(a) Interview the CI without witnesses, if requested.

(b) Distribute relief supplies and approved materials intended for educational, recreational, or religious purposes, or for assisting the CI in organizing their leisure time within the places of internment. Visiting representatives may not accept from the CI any letters, papers, documents, or articles for delivery.

(2) Social. Near relatives and other persons authorized by the theater commander will be permitted to visit the CI as frequently as possible in accordance with theater regulations. They should be advised that the taking of photographs on or about the facility is prohibited.

(3) Emergency visits by civilian internees. Subject to theater policy, the CI may visit their homes in urgent cases, particularly in cases of death or serious illness of close relatives.

c Education.

(1) The CI education program, as developed for each CI camp, will reflect consideration of the following.

(a) The several educational levels represented in the CI population of the camp.

(b) The establishment of basic courses of instruction to include elementary level reading, writing, geography, mathematics, language, music, art, history, and literature.

(c) The uninterrupted education of dependents residing with their CI parents. This education will reflect to the extent determined feasible by the theater commander, the educational curriculums of the particular country.

(d) The development of vocational training projects with an immediate view of developing skills that may be useful during internment and a longer range view of enabling the CI to learn a useful trade or which they may engage when returned to normal civilian life. Such projects may include, e. the discretion of the theater commander, carpentry, furnishing, masonry, repairing shoes and clothing, tailoring, barbering, potting, and farming.

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(2) Equipment required to support the education program will be requisitioned through normal supply channels. At the discretion of the camp commander, items not in supply may be purchased locally and paid for from the camp Civilian Internee Fund provided the items will benefit most CI. The CI personnel employed in the education program will be paid the established rate of pay from the camp Civilian Internee Fund.

d Religion.

(1) CI will enjoy freedom of religion, including attendance at services of their respective faiths held within the internment camps. Wines used for religious purposes will be permitted.

(2) CI who are clergy may minister freely to CI who voluntarily request their ministration. Equitable allocation of CI clergy will be effected among the various camps.

(3) If there is a shortage of CI clergy and the circumstances warrant, the camp commander will provide the CI clergy with the necessary means of transport for visiting the CI in branch camps and hospitals.

(4) The CI clergy will be permitted to correspond on religious matters with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faiths. This correspondence will not be considered as forming a part of the quota that may be established in accordance with paragraph 6–8, but will be subject to censorship.

(5) Ordained clergy or a theological student who are not CI may be authorized to enter a camp and conduct religious services. Visits by such personnel will be in accordance with procedures prescribed by the theater commander.

e Recreation.

(1) Recreational activities and facilities, in addition to sports and outdoor games, may include concerts and plays put on by the CI, recorded music, selected motion pictures, and other activities provided by the theater commander.

(2) Special playgrounds will be reserved for dependent children of the CI.

(3) Expenditures from the camp Civilian Internee Fund for the purchase or rental of recreational equipment are authorized.

(4) Appointed delegates of the International Committee of Red Cross are authorized to assist in developing recreational and welfare activities.

6–8. Procedures for communications

a Restrictions on numbers and addresses. Procedures for CI correspondence will be in accordance paragraph 3-5. a-f except that DA Forms 2668-R and 2680-R (Civilian Internee PostCard) will be substituted for DA Forms 2667-R and 2679-R (Civilian Internee Letter) respectively. No restriction will be placed on persons with whom the CI may correspond. DA Form 2679-R will be reproduced on 8 1/2-by 11-inch paper, head to head. DA Form 2680-R will be reproduced on 4-by 6-inch card, head to foot. Copies for local reproduction are located at the back of this regulation. These forms are for the use of Army only.

b Outgoing mail. The following procedures apply to outgoing mail.

(1) Letters and cards will be typed or written legibly in ink. Block printing may be used.

(2) Correspondence will be addressed as follows:

(a) Names and addresses will be complete; they will be placed in the spaces designated on the correspondence forms.

(b) The return address will be in block print to include the full name, grade, ISN, place and date of birth of the sender, and the name of the camp to which assigned. Instructions for including the APO number or the country in which the camp is located should be issued by local directives.

(c) A person at a branch camp will give the parent camp as the return address. The person will be retained on the rosters and postal records of the parent camp.

(d) The surnames in the address and return address of letters and cards will be underlined.

(3) Each person will be required to date his or her letters and cards. The name of the month will be written, not shown by a number.

(4) To expedite the handling of mail, CIs will designate the language of their communication.

(5) The date will not be crossed off, written over, or otherwise modified.

(6) Letters and cards will not be numbered consecutively.

(7) The entire letter or card will be written by the same person. If necessary, the address may be written by someone else.

(8) The CI may not write letters for others who are able to do so themselves. A person may be unable to write because of lack of education, accident, or sickness. If so, the camp commander may permit another person to write the message. In these cases, the person doing the writing will countersign the message.

(9) Letters and cards with parts excised, deleted, or otherwise mutilated before being dispatched from the camp will be returned to the person for rewriting.

c. Correspondence sent to civilian internees. Instructions on letters and cards that are sent to CI should be communicated by CI to their correspondents.

(1) The name and return address of the sender will be typewritten or hand printed. For letters, the sender's name and address will always appear on the backs of the envelope. The addressee's surname will be underlined.

(2) The name, grade, ISN of the detainee, the name or number of the base camp, and the geographical designation or APO number will be placed in the center lower half of the envelope card. These items are specified by local directives or the camp commander. The entire name of the detainee will be in block print. The address will be placed as near the lower edge of the envelope as possible; the postmark at the top will not be obscured or obliterated.

(3) The term "Civilian Internee Mail" will be placed in the upper left corner on the address side. In the upper right corner the words "Postage Free" must be shown.

d. Legal documents. Legal documents, such as wills and deeds, may be enclosed with outgoing correspondence. When it is necessary for a CI to send a legal document, the document and forwarding letter or card may be enclosed in a plain envelope.

e Maps, sketches, or drawings. The CI will not send maps, sketches, or drawings in outgoing correspondence.

f. Registered certified, insured, COD, or airmail items. Individuals will not be permitted to mail registered, certified, insured, COD, or airmail items. If registered, certified, insured, or COD mail of either domestic or foreign origin addressed to a detainee is received, it will be refused. The local post office will return them to the sender.

g. Postage. Letters and cards to and from the CI will be sent by ordinary mail and postage free.

h. Security. Outgoing letters and cards will be secured by using locked boxes or similar means. Only authorized U.S. personnel will handle outgoing mail. Incoming mail may be sorted by the CI when supervised by U.S. personnel.

i. Censorship. Censorship of the CI mail will be according to policies established by the theater commander.

(1) Outgoing letters and cards may be examined and read by the camp commander. The camp commander will return outgoing correspondence containing obvious deviations from regulations for rewriting.

(2) Camp commanders will name U.S. military personnel to supervise the opening of all mail pouches containing incoming letters and cards for CI. These items will be carefully examined by the named personnel before delivery to detainees. Those items that arrive without having been censored by appropriate censorship elements will be returned for censorship to the designated censorship elements.

(3) The CI complaints concerning mail delivery will not be directed to censorship elements. These will be directed to—

(a) The camp authorities.

(b) The responsible major Army commander.

(c) HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

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(d) The protecting power.

j. Procedures for parcels.

(1) A person may receive individual parcels and collective shipments containing—

(a) Foodstuffs.

(b) Clothing.

(c) Medical supplies.

(d) Articles of religious, educational, or recreational nature.

(2) Books, included in parcels of clothing and foodstuffs, may be confiscated as the camp commander decides.

(3) The CI may send parcels subject to such restrictions as may be deemed necessary by the theater commander with respect to quotas, contents, size, and weight. The CI may send parcels free of charge up to a weight of 5 kilograms per package, or 10 kilograms in the case of articles that cannot be separated (Art 39, Universal Postal Convention).

(4) Parcels received for transferred persons will be forwarded immediately to them.

(5) Nonperishable articles received for persons who have died, escaped, or been released will be forwarded to the Branch PWIC. Perishable items received for deceased or escaped persons will be released to the Internee Committee who will deliver them to the camp infirmary or hospital for the benefit of the CI.

(6) The contents of all incoming parcels will be examined at the camp by a U.S. officer in the presence of the addressee or the named representative. When considered necessary, the camp commander may request that the parcel be examined by the censorship element. The articles in each parcel will be removed. The string, the inner wrappings, the outer container, and any extraneous items found in the parcel will not be turned over to the CI or the named representatives. Examination will be close enough to reveal concealed articles and messages; however, undue destruction of contents of parcels will be avoided.

k. Telegrams and telephone calls. The CI may read and receive telegrams. They may not make or receive telephone calls.

(1) Dispatching telegrams will be as follows:

(a) A CI who has not received mail from next-of-kin for 3 months may send a telegram not earlier than one month from the date a previous telegram was sent.

(b) CI who are unable to receive mail from their next-of-kin or send mail to them by ordinary postal routes or who are a great distance from their home will be permitted to send one telegram a month.

(c) The CI who is seriously ill or who has received news of serious illness or death in the family will be permitted to send a telegram. The camp commander will authorize the sending of additional telegrams.

(2) The sending of telegrams as provided for in (1) above will be governed by the following:

(a) The message proper will consist of not more than 15 words.

(b) The cost of sending the telegram will be charged to the personal account of the CI.

(c) Arrangements for messages going to or through enemy-occupied countries will be made with the local International Committee of the Red Cross field director and will be sent through the International Committee of Red Cross, Geneva, Switzerland.

(d) Telegrams will be in the English.

(e) No telegram, except by members of the Internee Committee, will be sent to a Government official or to a protecting power.

(f) Telegrams will be censored according to instructions issued by the chief censor.

l. Books. The CI may receive books. Persons or organizations may donate new or unmarked used books, singly or in collections, to camp libraries. Books that arrive at camps uncensored will be censored by a representative of the censorship element. Publications (books, magazines, newspapers, and so forth) containing maps may be made available to the CI upon approval by the camp commander, provided they do not contain maps of the territory surrounding the camps.

m. Newspapers and magazines. The following may be made available to the CI:

(1) Current newspapers and magazines published in English in the United States and selected by the camp commanders.

(2) Unmarked, unused magazines in English published in the United States and distributed by approved relief or aid organizations received at the discretion of the camp commanders for camp libraries after censorship by the censorship element.

(3) Foreign language newspapers and magazines published in the United States, upon approval of the camp commander and after censorship of individual issues by the censorship element.

(4) Newspapers and magazines published outside the United States, regardless of language, must be approved by the theater commander or HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

6–9. Complaints and requests to camp commanders and protecting power

a. Persons may make complaints or requests to the camp commander, who will try to resolve the complaints and answer the requests. If the CI are not satisfied with the way the commander handles a complaint or request, they may submit it in writing, through channels, to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

b. Persons exercising the right to complain to the protecting power about their treatment and camp may do so—

(1) By mail.

(2) In person to the visiting representatives of the protecting power.

(3) Through their Internee Committee.

c. Written complaints to the protecting power will be forwarded promptly through HQDA (DAMO-ODL)NPWIC, WASH DC 20310-0400. A separate letter with the comments of the camp commander will be included. Military endorsements will not be placed on any CI communications.

d. If a protecting power communicates with a CI camp commander about any matter requiring an answer, the communication and commander=s reply will be forwarded to HQDA (DAMO-ODL) NPWIC, WASH DC 20310-0400, for proper action.

e. Any act or allegation of inhumane treatment or other violations of this regulation will be reported to HQDA (DAMO-ODL), WASH DC 20310-0400 as a Serious Incident Report. Reporting instructions in AR 190-40 will be used.

6–10. Discipline and security

Measures needed to maintain discipline and security will be set up in each camp and rigidly enforced. Offensive acts against discipline will be dealt with promptly. The camp commander will record disciplinary punishments. The record will be open to inspection by the protecting power.

a. Prohibited acts.

(1) Associations on close terms between the CI and U.S. military or civilian personnel.

(2) Exchange of gifts between the CI and U.S. military or civilian personnel.

(3) Setting up of courts by the CI. The CI will not have any disciplinary power or administer any punishment.

b. Regulations, orders, and notices. Regulations, orders, and notices on the conduct and activities of the CI will be written in a language the CI can understand. They will be posted in a place within each camp where the CI may read them. They will also be made available to persons who do not have access to posted copies. Additional copies will be given to the Internee Committee. This requirement will also apply to the text of the GC and texts of special agreements concluded under it. Every order and command addressed personally to the CI must be given in a language he or she understands. To protect persons from acts of violence, bodily injury, and threats of reprisals at the hand of fellow internees, a copy of a notice in the internee's language will be posted in every compound.

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NOTICE

The CI regardless of faith or political belief, who fear that their lives are in danger or that they may suffer physical injury at the hands of other detainees will immediately report the fact personally to any U.S. Army officer of the camp without consulting the Internee Committee. From that time on, the camp command will assure adequate protection to such civilian internees by segregation, transfer, or other means. Civilian internees who mistreat fellow internees will be punished.

Signed (Commanding Officer)

c. Courtesies. The normal civilian courtesies will be required of the CI in their relationships with military personnel. U.S. military personnel will be courteous and will extend to the CI the regard due them.

d. Flags and political emblems. Flags on which a political energy emblem or device appears will be seized. The CI will not have any political emblem, insignia, flag, or picture of political leaders. The CI may have pictures of political leaders that appear in magazines, books, and newspapers if the pictures are not removed.

e. Security. All security matters connected with the custody and utilization of the CI are the responsibilities of the theater commanders in overseas areas.

6–11. Provisions common to disciplinary and judicial punishments

a. General.

(1) If general laws, regulations, or orders declare acts committed by the CI to be punishable, whereas the same acts are not punishable when committed by persons who are not interned, these acts will only entail disciplinary punishment.

(2) When possible disciplinary punishment rather than judicial punishment will be used.

(3) The courts or authorities in passing sentence or awarding disciplinary punishment will consider the fact that the defendant is not a national of the United States. They will be free to reduce the penalty prescribed for the offense with which the CI is charged and will not be obliged to apply the prescribed minimum sentence but may impose a lesser one.

(4) Punishment will not be inhumane, brutal, or dangerous to the health of the CI. The age, sex, and state of health of the CI will be considered.

(5) Imprisonment in premises without daylight is prohibited.

(6) The length of time a CI is confined while awaiting a disciplinary hearing or a trial will be deducted from any disciplinary or judicial punishment involving confinement to which he or she may be sentenced and will be taken into account in finding any penalty.

(7) No CI may be punished more than once for the same offense.

(8) The CI who has served disciplinary punishment on judicial sentences will not be treated differently from other CI.

b. Confinement benefits. The CI undergoing confinement, whether before or after trial and whether in connection with disciplinary or judicial proceedings, will—

(1) Be allowed to exercise and stay in the open air at least two hours daily.

(2) Be allowed to attend daily sick call, receive medical attention as needed, and if necessary be transferred to a hospital.

(3) Be given enough food to maintain them in as good health as that provided other CI.

(4) Be permitted to confer with visiting representatives of the protecting power or the ICRC.

(5) Be permitted to receive spiritual assistance.

(6) If a minor, be treated with proper regard.

(7) Be provided with hygienic living conditions.

(8) Be provided adequate bedding and supplies and facilities necessary for personal cleanliness.

(9) If a female, be confined in separate quarters from male CI and will be under the immediate supervision of women.

6–12. Disciplinary proceedings and punishments

a. Authority to order disciplinary punishment. Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the camp commander.

b. Rights of accused prior to imposition of disciplinary punishment. Prior to imposition of disciplinary punishment, the CI will be—

(1) Provided precise information regarding the offense of which they are accused.

(2) Given an opportunity to defend the allegation.

(3) Permitted to call witnesses and to have, if necessary, the service of a qualified interpreter.

c. Authorized disciplinary punishment. The following disciplinary punishments are authorized:

(1) Discontinuance of privileges granted over and above the treatment provided for by this regulation.

(2) Confinement.

(3) A fine not to exceed one-half of the wages that the CI may receive during a period of not more than 30 days.

(4) Extra fatigue duties, not exceeding 2 hours daily, in connection with maintaining the internment camp.

d. Duration of disciplinary punishment.

(1) The duration of any single disciplinary punishment will not exceed 30 consecutive days. The maximum of 30 days will not be exceeded even if the CI is answerable for several breaches of discipline, whether related or not, at the time when punishment is imposed.

(2) The period elapsing between the pronouncing of the disciplinary punishment and the completion of its execution will not exceed 30 days.

(3) After imposition of disciplinary punishment on the CI, further discipline will not be imposed on the same CI until at least 3 days have elapsed between the execution of any two of the punishments if the duration on one of the two punishments is 10 days or more.

e. Escape and connected offenses.

(1) The CI who are recaptured after having escaped or when attempting to escape will be liable to disciplinary punishment with respect to this act only, even if it is a repeated offense.

(2) The CI punished as a result of escape or attempt to escape may be subjected to special surveillance that does not affect the state of their health, when the punishment is exercised in a CI camp and if it does not violate any of the provisions of this regulation.

(3) The CI who aid and abet an escape or an attempt to escape, if no injury is done to a person, will be liable to disciplinary punishment only.

(4) Escape, or attempt to escape, even if it is a repeated offense, will not be deemed an aggravating circumstance in cases where the CI is prosecuted for offenses committed incidental to or during his or her escape or attempt to escape.

(5) The CI is liable to prosecution for an escape or attempted escape that results in a death or serious bodily injury to another person.

f. Confinement pending hearing.

(1) The CI accused of an offense for which disciplinary punishment is contemplated will not be confined pending a disciplinary hearing unless it is essential to the interest of camp order and discipline. Its duration will in any case be deducted from any sentence of confinement.

(2) Any period spent by the CI in confinement awaiting a hearing will be reduced to an absolute minimum. For offenses entailing disciplinary punishment only, it will not exceed 14 days.

g. Confinement facilities. CI confined as disciplinary punishment will undergo their punishment in a CI camp stockade.

h. Confinement benefits. In addition to the benefits provided by paragraph 6-11 *b* of this regulation, the CI placed in confinement in connection with disciplinary proceedings will be allowed to send and receive letters, cards, and telegrams in accordance with the

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provisions of this chapter. Parcels and remittances of money, however, may be withheld from the CI until the completion of the punishment. Parcels will be released to the safekeeping of the Internee Committee. If perishable goods are contained in the parcels, the Internee Committee will give them to the infirmary or hospital.

6–13. Judicial proceedings

a. General principles.

(1) The penal laws of the occupied territory will remain in force, with the exception that they may be repealed or suspended by the United States in cases where they constitute a threat to its security or an obstacle to the application of the GC.

(2) The United States may subject the population of the occupied territory to provisions that are essential to enable it to fulfill its obligation under the GC, to maintain orderly government of the territory, and to ensure the security of the U.S. Armed Forces.

(3) The penal provisions enacted by the United States will not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of penal provisions will not be retroactive.

(4) The CI may be tried by general court-martial that must sit within the occupied territory. The CI will not be tried before summary or special court-martial.

(5) No CI will be tried or sentenced for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed.

(6) No protected person may be punished for an offense he or she has not personally committed.

(7) No moral or physical coercion will be exerted to induce the CI to admit guilt for any act.

(8) No CI will be convicted without having had the chance to present a defense with the assistance of a qualified advocate or counsel.

b. Notification of judicial procedures.

(1) The accused will be promptly notified, in writing in a language they understand, of the charges against them and will be tried as rapidly as possible.

(2) A notice (in duplicate) of proceedings against the CI will be submitted through channels to HQDA (DAMO-ODL) NPWIC, WASH DC 20310-0400 for transmittal to the protecting power, in cases of charges involving the death penalty or imprisonment for 2 years or more. Upon request, the protecting power will be furnished with information regarding the status of such proceedings. Furthermore, the protecting power will be entitled, on request, to be furnished with all particulars of any other proceedings instituted against the CI.

(3) The above notice will be sent without delay. The trial will not commence until 3 weeks after the protecting power has been notified.

(4) The notice will include the following:

(a) Surname and first names, internment serial number, date of birth, and profession, trade, or prior civil capacity of the CI.

(b) Place of internment.

(c) Specification of the charges with penal provisions under which they are brought.

(d) Designation of the court that will hear the case.

(e) Place and date of the first hearing.

(5) The Internee Committee will be informed of all judicial proceedings against the CI that it represents and of the results of the proceedings.

(6) The records of trials will be kept by the courts and will be open to inspection by the representatives of the protecting power.

c. Rights and means of defense.

(1) In each trial by court-martial, the accused will be entitled to assistance by a qualified advocate or counsel of his or her own choice, the calling of witnesses, and if necessary the services of a competent interpreter. The CI will be advised of these rights by the commander concerned in due time before the trial.

(2) When the accused does not exercise the right to choose an advocate or counsel, notice to that effect will be sent through HQDA, ODCSOPS(DAMO-ODL), NPWIC, WASH DC 20310-0400, to the protecting power. The protecting power may provide a counsel.

(3) When the protecting power is not functioning and the accused is faced with a serious charge, the convening authority will provide, subject to consent of the accused, an advocate or counsel.

(4) Unless the CI freely waives such assistance, an accused will be provided with the assistance of an interpreter both during preliminary investigation and during the hearing in court. The CI will have the right to object to the interpreter provided and to ask for a replacement.

(5) The defense counsel will be given at least 2 weeks before the opening of the trial and will be granted the necessary facilities to prepare the defense of the accused. The defense counsel will be permitted to visit the accused freely and to interview the accused in private. The defense counsel will also be permitted to confer with any witnesses for the defense including other CI. These privileges will continue until the term of appeal or petition has expired.

(6) Copies of the charge sheet will be given to the accused and the defense counsel in the language that they understand at least 2 weeks before the trial begins.

(7) The interpreter, appointed for and sworn by the court, will provide the official translation of all trial proceedings. The interpreter must not be a trial counsel, defense counsel, assistant to either, or witness; nor should he or she have any bias or interest in the case. The interpreter will translate testimony given in the language of the accused into English for the benefit of the court.

d. Participation of protecting power in criminal proceedings. Representatives of the protecting power will be permitted to attend the trial of any CI unless the hearing has to be held secretly as an exceptional measure in the interest of the security of the United States. If a trial is to be held in secret, a notice as to the reasons, the date, and place of the secret trial will be sent to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400. They will be notified at least three weeks before the opening of the trial to permit timely notification to the protecting power.

e. Notification of judgment and sentence.

(1) In all cases requiring notification to the protecting power, two copies of the findings, and if applicable the sentence will be forwarded immediately to HQDA, ODCSOPS(DAMO-ODL), NPWIC WASH DC 20310-0400, in the form of a summary communication for transmittal to the protecting power. When NPWIC transmits this information to the protecting power, it will include a brief statement of the appellate rights of the accused. Notification as to the decision of the CI to use or waive his or her right to appeal will also be forwarded (in duplicate) to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power. If the sentence adjudged is death, the information set forth in *g* below, together with one copy of the court-martial record of trial will be forwarded to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power.

(2) After final approval of a sentence involving the death penalty or imprisonment for 2 years or more, the following information will be forwarded (in duplicate) to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power:

(a) A precise wording of the approved finding and sentence.

(b) A summarized report of the evidence.

(c) If applicable, the name of the place where confinement will be served.

f. Appeals in criminal proceedings.

(1) The convicted CI sentenced to confinement or to punishment other than death will have the right of appeal provided for by the laws applied by the court. In all instances, the CI condemned to death will be permitted to petition for pardon or reprieve. The CI will be fully informed of the right to appeal or petition and of the time within which it must be done.

(2) When the laws applied by the court make no provision for appeals, the convicted CI will have the right to petition against the finding and sentence to the competent authority of the United States.

(3) Any period allowed for appeal in the case of sentences involving the death penalty or imprisonment of 2 years or more will not begin to run until notification of the judgment has been received by the protecting power.

(4) Courts of Appeal, if at all possible, will sit in the occupied territory.

g. Death penalty.

(1) The CI will be informed as soon as possible of all offenses that are punishable by the death sentence under applicable laws. Lists of these offenses will be posted in all camps. Duplicate lists will be given to the Internee Committee.

(2) The death sentence may not be pronounced against the CI who was under 18 years of age at the time of the offense unless the attention of the court has been particularly called to the fact that since the accused is not a national of the United States, he or she is not bound to it by any duty or allegiance.

(3) If the death sentence is pronounced, it will not be executed for at least 6 months from the date when the protecting power received the detailed communication furnished by the United States in regard to trial (*e.* above) except as provided in (4) below.

(4) The 6-month period after suspension of the death sentence ((3) above) may be reduced in an individual case in circumstances of grave emergency involving an organized threat to the security of the United States. However, the protecting power must always be notified by HQDA (DAMO-ODL) as to the exception to the 6-month waiting period.

h. Civil proceedings. In every case where the CI is a party to any civil litigation, the camp commander will if the CI so requests inform the court of his or her detention. The camp commander will, within legal limits, take all necessary steps to prevent the CI from being in any way prejudiced by reason of his or her internment regarding the preparation and conduct of the case or execution of any judgment of the court.

i. Confinement pending trial. A pretrial investigation of an offense alleged to have been committed by the CI will be conducted rapidly so that the trial will take place as soon as possible. The CI will not be confined while awaiting trial unless a civilian national of the occupied territory would be so confined if accused of a similar offense. The CI may be confined if it is essential to do so in the interest of camp or national security. However, this confinement will never exceed 3 months.

j. Confinement facilities. CI confined as judicial punishment will serve their sentences in an internment facility, assigned by the theater commander, in the occupied territory as long as U.S. authorities can guarantee their protection.

k. Confinement benefits. In addition to the benefits stated in paragraph 6-11*b*, the CI placed in confinement in connection with judicial proceedings will be permitted to receive one relief parcel each month.

6–14. Death and burial

a. Reference. For general procedures and authorized expenses for the care and disposition of remains, see AR 638-30 and AR 638-40.

b. Disposition of wills. When a person has chosen to make a will, the original and two certified copies will be forwarded to the Branch PWIC upon death or at the CI's request.

c. Information furnished to camp or hospital commander upon death. When the CI in U.S. custody dies, the attending medical officer will promptly furnish the following to the camp (or hospital) commander, the local provost marshal, or other officers who were charged with the custody of the CI prior to his or her death.

(1) Full name.

(2) ISN.

(3) Date, place, and cause of death.

(4) Statement that in his or her opinion death was, or was not, the result of the CI's own misconduct.

(5) When the cause of death is undetermined, the medical officer will make a statement to that effect.

(6) When the cause of death is finally determined, a supplemental report will be made.

d. Notifying the Branch PWIC of a death. The camp or hospital commander or other officer charged with custody of the CI prior to his or her death will notify the local Branch PWIC immediately by telegram of the death. Notification will include all data required in *c* above. The use of supplemental reports is authorized until requirements have been met.

e. Certificate of Death. A copy of DA Form 2669-R is contained in this regulation. For each death, the attending medical officer and the responsible camp commander will complete a DA Form 2669-R. The form will be made out in enough copies to provide the distribution below.

(1) Original—NPWIC.

(2) Copy—Branch PWIC.

(3) Copy—The Surgeon General.

(4) Copy—CI's Personnel File.

(5) If the CI dies in the United States, a copy will be sent to the proper civil authorities responsible for recording deaths in that State.

f. Investigating officer's report.

(1) The camp or hospital commander will appoint an officer to investigate and report the following:

(a) Each death or serious injury caused, or suspected to have been caused, by guards or sentries, another CI, or any other person.

(b) Each suicide or death resulting from unnatural or unknown causes.

(2) The precepts outlined in OC 1949, part IV, section 3, will be used as a guide. (See DA Pam 27-1.)

(3) Military police investigators may be used at the discretion of the camp commander.

g. Burial, record of interment, and cremation.

(1) The deceased CI will be buried honorably in a cemetery set up for them according to AR 638-30 and if possible, according to the rites of their religion. Unless unavoidable circumstances require the use of collective (group or mass) graves, the CI will be buried in a separate grave.

(2) Graves Registration Services will record information on burials and graves. A copy of DD Form 551 (Record of Interment) will be forwarded to the Branch PWIC. The United States will care for graves and record of any subsequent moves of the remains.

(3) A body may be cremated only because of imperative hygiene reasons, the CI's religion, or the CI's request for cremation. The reason for cremation of a body will be cited on the death certificate. Ashes will be kept by Graves Registration until proper disposal can be decided according to the instructions of the protecting power.

h. Forwarding deceased person's file. The personnel files of a deceased person with all pertinent records will be forwarded to the Branch PWIC.

6–15. Transfers

a. Authority to transfer. Theater commanders may direct the transfer of the CI, subject to the following conditions:

(1) The CI may not be transferred beyond the borders of the occupied country in which interned except when for material reasons it is impossible to avoid such displacement. The CI thus evacuated will be transferred back to the area from which they were evacuated as soon as hostilities in that area have ceased.

(2) The sick, wounded, or infirmed CI, as well as maternity cases, will not be transferred if the journey would be seriously detrimental to the health of the CI.

(3) If the combat zone draws close to an internment camp, CI may not be transferred unless they can be moved under adequate conditions of safety. However, CI may be moved if they would be exposed to greater risks by remaining than by being transferred.

b. Notification of transfer.

(1) The CI to be transferred will be officially advised of their departure and their new postal address in time for them to pack their luggage and notify their next-of-kin. The Internee Committee members to be transferred will be notified in time to acquaint their successors with their duties and related current affairs.

(2) The Branch PWIC and NPWIC will be notified immediately of any CI transferred.

c. Treatment during transfer.

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(1) Generally, the CI will be transferred under conditions equal to those used for the transfer of personnel of the U.S. Military in the occupied territory. If, as an exceptional measure, the CI must be transferred on foot, only those who are in a fit state of health may be so transferred. The CI will not be exposed to excessive fatigue during transfer by foot.

(2) The sick, wounded, or infirmed CI as well as maternity cases will be evacuated through U.S. military medical channels and will remain in medical channels until they are certified "fit for normal internment" by competent medical authorities.

(3) Potable water and food sufficient in quantity, quality, and variety to maintain them in good health will be provided to the CI during transfer.

(4) Necessary clothing, adequate shelter, and medical attention will be made available.

(5) Suitable precautions will be taken to prevent CI from escaping and to ensure their safety.

d. Transfer of personal effects and property.

(1) The CI will be permitted to take with them their personal effects and property. The weight of their baggage may be limited if the conditions of transfer so require, but in no case will it be limited to less than 55 pounds per CI. The personal property that the CI are unable to carry will be forwarded separately.

(2) The mail and parcels addressed to CI who have been transferred will be forwarded to them.

(3) Property, such as that used for religious services, or items donated by welfare agencies will be forwarded as community property. These items are not to be considered a part of the 55 pounds of personal effects and property that each CI is authorized to take.

6–16. Release

a. General.

(1) Control and accountability of CI will be maintained until the CI is receipted for by a representative of his or her country of residence or a designated protecting power.

(2) After hostilities cease and subject to the provisions of (3) below, CI will be released as soon as the reasons for their internment are determined by the theater commander to no longer exist.

(3) The CI who are eligible for release but have judicial proceedings pending for offenses not exclusively subject to disciplinary punishment will be detained until the close of the proceedings. At the discretion of the theater commander, the CI may be detained until completion of their penalty. The CI previously sentenced to confinement as judicial punishment may be similarly detained. Lists of the CI held under this guidance will be forwarded to the Branch PWIC and NPWIC for transmittal to the protecting power.

b. Return of impounded personal effects. Upon release, the CI will be given all articles, moneys, or other valuables impounded during internment and will receive in currency the balance of any credit to their accounts. If the theater commander directs that any impounded currency or articles be withheld, the CI will be given a receipt.

c. Cost of transport. The United States will pay the cost of returning the released CI to the places where they were living when interned.

d. Medical fitness. The CI will not be admitted into the general population until their medical fitness is determined.

Chapter 7
Employment and Compensation—Civilian Internees

7–1. General

a. Theater commanders may issue, within their respective commands, implementing instructions governing the employment and compensation of the CI consistent with these regulations. Copies of such instructions will be forwarded promptly to ODCSOPS.

b. The CI will be employed, so far as possible, in work necessary for the construction, administration, management, and maintenance of the CI camps.

c. The CI compensation procedures will be accomplished in accordance with AR 37-1.

7–2. Ability to perform labor

a. The CI will be required to perform any work consistent with their age and physical condition and in accordance with this regulation.

b. The fitness of CI for labor will be determined using the same procedures as those outlined in paragraph 3–4 *b*.

c. The CI under 18 years of age will not be compelled to work.

7–3. Authorized work

a. Compulsory. The CI may be compelled to perform only the following type of work:

(1) Administrative, maintenance, and domestic work in an internment camp.

(2) Duties connected with the protection of the CI against aerial bombardment or other war risks.

(3) Medical duties if they are professionally and technically qualified.

b. Voluntary. Subject to the provisions of paragraph 4–4, and to other restrictions as may be imposed by the theater commander, the CI may volunteer for, but may not be compelled to perform, work of any type without regard to the military character, purpose, or classification of the work. They will be free to terminate such work at any time subject to having labored for 6 weeks and having given an 8-day notice.

7–4. Unauthorized work

The criteria for unauthorized work for CI is the same as those found for EPW/RP in paragraph 4-5.

7–5. Working conditions

The working conditions for the CI, to include protective clothing, equipment, and safety devices, will be at least as favorable as those prescribed for the civilian population of the occupied territory by the national laws and regulations and as provided for in existing practice. In no case will the working conditions for the CI be inferior to those for the civilian population employed in work of the same nature and in the same district.

7–6. Length of workday

a. The length of the working day of the CI will not exceed that permitted for civilians in the locality who are employed in the same general type of work. A rest period of not less than 1 hour will be allowed during the workday.

b. The length of the workday for CI will be in accordance with paragraph 4–8.

7–7. Day of rest

Each CI will be allowed a rest of 24 consecutive hours every week, preferably on Sunday or on the day of rest in his or her country.

7–8. Paid work

The following are types of work for which the CI will be compensated:

a. Services, including domestic tasks, in connection with administering and maintaining CI camps, branch camps, and hospitals when the CI performs these services permanently.

b. Spiritual and medical duties performed by the CI on behalf of their fellow CI.

c. Services as members and as assistants to the members of the Internee Committee. These persons will be paid from the camp Civilian Internee Account. If there is no such account, they will be paid the prescribed rate from U.S. Army appropriated funds.

d. All types of work that the CI does not have to do but does voluntarily.

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7–9. Unpaid work

The criteria for unpaid work for CI is the same as for EPW/RP found in paragraph 4-18.

7–10. Compensation for paid work

The daily compensation that the CI will receive for paid work will be announced by the Department of the Army at an appropriate time subsequent to an outbreak of hostilities. The CI compensation procedures will be in accordance with AR 37-1.

7–11. Disability compensation

Procedures for CI disability compensation will be the same as those found in paragraph 4-20.

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Appendix A
References

Section I
Required Publications

AR 37–1
Army Accounting and Fund Control. (Cited in para 3-3n.)

AR 40–3
Medical, Dental, and Veterinary Care. (Cited in para 6-6d.)

AR 40–5
Preventive Medicine. (Cited in para 6-6g.)

AR 190–40
Serious Incident Report. (Cited in para 3-16f.)

AR 195–2
Criminal Investigation Activities. (Cited in para 1-4h.)

AR 600–8–1
Army Casualty Operation/Assistance/Insurance. (Cited in para 3-10a.)

AR 600–25
Salutes, Honors, and Visits of Courtesy. (Cited in para 3-6c.(4))

AR 600–55
The Army Driver and Operator Standardization Program (Selection, Training,Testing, and Licensing). (Cited in para 4-21)

AR 638–30
Graves Registration Organization and Functions in Support Major Military Operations. (Cited in para 3-10a.)

AR 670–1
Wear and Appearance of Army Uniforms and Insignia. (Cited in para 3-15e.)

AR 735–5
Policies and Procedures for Property Accountability. (Cited in para 3-9b.)

FM 22–5
Drill and Ceremonies. (Cited in para 3-6c.(4))

Dictionary of Occupational Titles
(Cited in para 4-13a.)

Manual for Courts–Martial
Manual for Courts-Martial, U.S., 1984. (Cited in para 3-7b.)

Uniform Code of Military Justice
(Cited in para 3-7b.)

DODD 2310.1
DOD Program for Enemy Prisoners of War (EPOW) and Other Detainees. (Cited in para 1-4g.)

DODD 5100.77
DOD Law of War Program. (Cited in para 1-4a.(2))

Section II
Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.

AR 40–66
Medical Record Administration.

AR 40–400
Patient Administration.

AR 55–355
Defense Traffic Management Regulation. (NAVSUPINST 4600.70, AFR 75-2, MCO P4600.14B, DLAR 4500.3

AR 190–14
Carrying of Firearms and Use of Force for Law Enforcement and Security Duties.

AR 190–47
The Army Corrections System

AR 355–15
Management Information Control System

AR 380–5
Department of the Army Information Security Program.

AR 985 series
Army Safety Program.

DA PAM 27–1
Treaties Governing Land Warfare.

FM 33–1
Psychological Operations

AF Handbook (AFH) 31–302
Air Base Defense and Contingency Operations Guidance and Procedures.

SECNAVINST 3461.3
Program for Prisoners of War and Other Detainees.

Section III
Prescribed Forms

DA Form 2662–R
EPW Identity Card. (Prescribed in para 3-3a(2)(b))

DA Form 2663–R
Fingerprint Card. (Prescribed in para 3-3a(2)(c))

DA Form 2664–R
Weight Register. (Prescribed in para 3-4i(3))

DA Form 2665–R
Capture Card for Prisoner of War. (Prescribed in para 3-5d(5))

DA Form 2666–R
Prisoner of War - Notification of Address. (Prescribed in para 3-5d(4))

DA Form 2667–R
Prisoner of War Mail - Letter. (Prescribed in para 3-5d(1))

DA Form 2668–R
Prisoner of War Mail - Post Card. (Prescribed in para 3-5d(1))

DA Form 2669–R
Certificate of Death. (Prescribed in para 3-10e)

DA Form 2670–R
Mixed Medical Commission Certificate for EPW. (Prescribed in para 3-12j)

DA Form 2671–R
Certificate of Direct Repatriation for EPW. (Prescribed in para 3-12k)

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DA Form 2672–R
Classification Questionnaire for Officer Retained Personnel.

DA Form 2673–R
Classification Questionnaire for Enlisted Retained Personnel.

DA Form 2674–R
Enemy Prisoner of War/Civilian Internee Strength Report.

DA Form 2675–R
Certificate of Work Incurred Injury or Disability. (Prescribed in para 6-6f(2))

DA Form 2677–R
Civilian Internee Identity Card. (Prescribed in para 6-2e)

DA Form 2678–R
Civilian Internee Notification of Address. Prescribed in para 6-2f)

DA Form 2679–R
Civilian Internee Mail. (Prescribed in para 6-8a)

DA Form 2680–R
Civilian Internee Post Card. (Prescribed in para 6-8a)

DA Form 4237–R
Detainee Personnel Record. (Prescribed in para 3-3a(2)(b))

DD Form 2745
Enemy Prisoner of War (EPW) Capture Tag. (Prescribed in para 2-1b.)

Section IV
Referenced Forms

DA Form 1132
Prisoners Personal Property List - Personal Deposit Fund

DD Form 551
Record of Internment

DD Form 629
Receipt for Prisoner or Detained Person

Standard Form 88
Report of Medical Examination

Standard Form 600
Chronological Record of Medical Care

DA Form 1132
Prisoners Personal Property List-Personal Deposit Fund

DA Form 3444
Treatment Record

DA Form 4137
Receipt for Evidence/Property Custody Document

Appendix B
Internment Serial Number

The internment serial number (ISN) is a unique identification number assigned to each EPW, RP and CI taken into the custody of the U.S. Armed Forces. Throughout internment/detention, EPW/CI are identified, PWIS accountability for EPW, RP and CI by the U.S. is established when the ISN is assigned. The ISN will consist of three components, with the first two separated by a dash as follows:

a. First Component. The first component will contain five characters. The first two will be the alpha-characters 'US'. The third character will be either the alpha or numeric designation for the command/theater under which the EPW, RP and CI came into the custody of the U.S. The fourth and fifth positions are alpha-characters designating the EPW, RP and CI serving power.

b. Second Component. The second component is a six character numeric identifier. These numbers will be assigned consecutively to all EPW, RP and CI processed through ISN assigning organizations. The Branch PWIC will assign blocks of numbers to ISN assigning organizations/elements in the supported theater.

c. Third Component. The third component will consist of an acronym identifying the classification of the individual: either EPW, RP, or CI, to represent Enemy Prisoner of War, Retained Person, or Civilian Internee, respectively. Should an individual that was initially classified as an EPW later determined to be a medically or religiously qualified retained person, the classification may be changed to "RP" with the approval of the EPW command/brigade.

d. Example. The first EPW processed by an ISN assigning organization in a theater designated as "9" and whose country was designated as "AB" will be assigned the following ISN: US9AB- 000001-EPW. The tenth such EPW processed by the same command will be assigned the ISN of: US9AB-000010-EPW. If the eleventh individual processed by the same command was an RP and the fifteenth a CI, their ISNs would be: US9AB-000011-RP and US9AB-000015-CI, respectively.

e. EPW transferred to CONUS without having been assigned an ISN and those captured within the Continental U.S., will be processed and assigned an ISN as above, by the CONUS EPW organizations.

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Glossary

Section II
Abbreviations

Section I
Abbreviations

ADP
Automated Data Processing

APO
Army Post Office

Cdr
Commander

CI
Civilian Internee(s)

COD
Cash on Delivery

CONUS
Continental U.S.

CTA
Central Tracing Agency

DA
Department of the Army

DAR
Defense Acquisition Regulation

DCSINT
Deputy Chief of Staff for Intelligence

DCSLOG
Deputy Chief of Staff for Logistics

DCSOPS
Deputy Chief of Staff for Operations and Plans

DCSPER
Deputy Chief of Staff for Personnel

DOD
Department of Defense

DRMO
Defense Revitilization and Marketing Office

EDCSA
Effective Date of Change of Strength Accountability

EPW
Enemy Prisoner(s) of War

FAO
Finance and accounting officer

FBI
Federal Bureau of Investigation

FORSCOM
Forces Command

GC
Geneva Convention Relative to the Protection of Civilian Persons in time of War

GPW
Geneva Convention Relative to the Treatment of Prisoners of War

GWS
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field

GWS SEA
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

HQDA
Headquarters, Department of the Army

HSC
U.S. Army Health Services Command

ICRC
International Committee of the Red Cross

ISN
Internment Serial Number

JCS
Joint Chiefs of Staff

MPMIS
Military Police Management Information Systems

NCO
noncommissioned Officer

OD
Other Detainees

OSD
Office of the Secretary of Defense

NPWIC
National Prisoner of War Information Center

PP
Protected Person

PSYOP
Psychological Operations

PWIC
Prisoner of War Information Center

RP
Retained Personnel

ROK
Republic of Korea

SJA
Staff Judge Advocate

TJAG
The Judge Advocate General

TRADOC
U.S. Army Training and Doctrine Command

TSG
The Surgeon General

TST
Tuberculin Skin Test

UCMJ
Uniform Code of Military Justice

USAFAC
U.S. Army Finance and Accounting Center

USFK
U.S. Armed Forces, Korea

Section II
Terms

Canteen
A facility set up for the sale of authorized services and items of merchandise.

Central Tracing Agency
Centralizes tracing requests concerning all persons reported missing during the conflict. Requests are either forwarded by centralized information bureaus or submitted by families via their respective National Red Cross or Red Crescent Societies. The Central Tracing Agency (CTA) then passes them on for processing to the appropriate authorities and forwards replies to the requesters.

Civilian Internee(s)
A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.

Civilian Internee Account
Accounts established and records maintained under control of the disbursing officer. Deposit Fund Account 21X6015.

Civilian Internee Branch Camp
A subsidiary camp under the supervision and administration of a civilian internee camp.

Civilian Internee Camp
An installation established for the internment and administration of civilian internees.

Civilian Internee Compound
A subdivision of a CI enclosure.

Civilian Internee Enclosure
A subdivision of a CI camp.

Contract Employee
Any person, corporation, association, State or municipal government agency, and other employer (except DOD) that contracts for work to be done.

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Dependent Child Internee
A child who on request of the interned parents, for compassionate reasons, is accommodated in a CI internment camp with the interned parents.

Detainee
A term used to refer to any person captured or otherwise detained by an armed force.

Domestic Service
Such normal household duties as preparing and serving food and the care and repair of clothing.

Enemy Prisoner of War
A detained person as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. In particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. As such, he or she is entitled to the combatant's privilege of immunity from the municipal law of the capturing state for warlike acts which do not amount to breaches of the law of armed conflict. For example, a prisoner of war may be, but is not limited to, any person belonging to one of the following categories who has fallen into the power of the enemy: a member of the armed forces, organized militia or volunteer corps; a person who accompanies the armed forces without actually being a member thereof; a member of a merchant marine or civilian aircraft crew not qualifying for more favorable treatment; or individuals who, on the approach of the enemy, spontaneously take up arms to resist invading forces.

Enlisted EPW
Enlisted EPW and civilian EPW entitled to be treated as enlisted EPW.

EPW Branch Camp
A subsidiary camp under supervision and administration of the main EPW camp.

EPW Camp
A camp set up by the U.S. Army for the separate internment and complete administration of EPW.

EPW Compound
A subdivision of an EPW enclosure.

EPW Enclosure
A subdivision of an EPW camp. Internment Serial Number Unique, controlled identification number assigned an EPW upon capture and entry into the Prisoner of War Information System.

Military Nature
Term that applies to those items or those types of construction that are used exclusively by members of the Armed Forces for operational purposes (e.g., arms, helmets). The purposes are in contrast to items or structures that may be used either by civilian or military personnel (e.g., food, boots, buildings, public roads, or railroads).

Military Purpose
Activities intended primarily or exclusively for military operations as contrasted with activities intended primarily or exclusively for other purposes.

Noncommissioned Officer EPW
Enlisted EPW and civilian EPW entitled to be treated as a Noncommissioned Officer EPW.

Other Detainee (OD)
Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority.

Personal Effects
Personal effects the EPW may retain include the following:

a. Clothing.

b. Mess equipment (knives and forks excluded).

c. Badges of rank and nationality.

d. Decorations.

e. Identification cards or tags.

f. Religious literature.

g. Articles that are of a personal use or have a sentimental value to the person.

h. Protective mask.

Prisoner of War Information System
A computer information system designed to assist military police in the field, the Branch PWIC and the National PWIC to manage enemy prisoners of war by providing automated support for the policies and procedures established by regulation.

Prisoner of War Information Center (PWIC)
A TOE organization established to collect information pertaining to EPW, RP and CI and to transmit such information to the National Prisoner of War Information Center.

Protected Person
Persons protected by the Geneva Convention who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Retained Personnel
Enemy personnel who come within any of the categories below are eligible to be classified as retained personnel (RP):

a. Medical personnel who are members of the medical service of their armed forces.

b. Medical personnel exclusively engaged in the—

(1) Search for, collection, transport, or treatment of, the wounded or sick.

(2) Prevention of disease.

(3) Staff administration of medical units and establishments exclusively.

c. Chaplains attached to enemy armed forces.

d. Staff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments. The staffs of such societies must be subject to military laws and regulations.

Section III
Special Abbreviations and Terms
This section contains no entries.

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00000128

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITONER'S RULE 26 DISCLOSURES

I. Potential Witnesses

Yaser Esam Hamdi
Norfolk Naval Brig
Norfolk, Virginia

John Walker Lindh
Alexandria, Virginia

Esam Fouad Hamdi
P.O. Box 240
Jubail, Saudi Arabia 31951
966-55-903131

II. Documents

None other than those attached to the filings in this case.

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CERTIFICATE OF SERVICE

I certify that on this 22th day of July, 2002, a copy of the foregoing Rule 26 Disclosures was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division., World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

Geremy C. Kamens
Assistant Federal Public Defender

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA
150 BOUSH ST., SUITE 403
NORFOLK, VIRGINIA 23510
(757)457-0800
FAX: (757) 457-0880

DIRECT: (757) 457-0808

FRANK DUNHAM, JR.
FEDERAL PUBLIC DEFENDER

July 22, 2002

Lawrence R. Leonard
Managing Assistant United States Attorney
United States Attorney's Office
8000 World Trade Center
101 W. Main Street
Norfolk, Virginia 23510

Re: Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et. al.
Case No. 2:02cv439

Dear Mr Leonard:

Enclosed please find a copy of Petitioner's Rule 26 Disclosures. This information is provided solely for purposes of discovery in this case.

Sincerely,

Geremy C. Kamens
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CLERKS OFFICE
2002 JUL 22 A 11:58
NORFOLK, VA.

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. Civil Action No. 2:02cv439

DONALD RUMSFELD, Secretary of Defense,

COMMANDER W.R. PAULETTE, Norfolk Naval Brig,

Respondents.

RESPONDENTS' RULE 26 STATEMENT

Respondents Donald Rumsfeld and Commander W.R. Paulette respond to the Court's Order that they make their Initial Disclosures pursuant to Fed.R.Civ.P. 26(a)(1) as follows:

The Court's Order is without jurisdiction and, in any event, improper. Because the Fourth Circuit has yet to issue its mandate, jurisdiction over this matter remains in the Fourth Circuit, and respondents therefore continue to object to this Court's improper effort to exercise jurisdiction. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995). The Fourth Circuit's July 12, 2002 decision in this case deals directly with the appropriate procedures to be followed in this case, especially with respect to any demands that may be placed on respondents before the filing of their response. See Hamdi v. Rumsfeld, 4th Cir. No. 02-6895, slip. op. 14-15.

Furthermore, even apart from the fact that the court of appeals' mandate has not yet issued,

the Court's Order is plainly premature at this point in the proceedings. Respondents' answer to the petition is not due (under this Court's improper July 18 Order) until July 25, four days after the initial disclosure deadline set by the Court. Moreover, the Court has ordered initial disclosures even before it has considered respondents' objection to the appointment of counsel pursuant to 18 U.S.C. 3006A, in accordance with the clear direction of the Fourth Circuit's decision. See Hamdi, slip. op. at 14 n.2. The Court's Order to make initial disclosures in accordance with Rule 26 contradicts the Fourth Circuit's explicit direction to this Court to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at 15.

In any event, Rule 26 specifically exempts from any initial disclosure requirement actions, such as this, involving "a petition for habeas corpus." Fed. R. Civ. P. 26(a)(1)(E)(ii). In addition, as respondents will explain in their return, the habeas petition in this case raises a purely legal question. Moreover, as respondents also will explain in their return, the proper focus of the Court's inquiry is the government's proffered basis for its decision. Because the analysis focuses on the government's stated basis for its decision, there is no occasion for discovery. The same basic principles apply in the Administrative Procedure Act context (when there is much less deferential judicial review than in this type of action), and for that reason Rule 26 does not apply in "an action for review on an administrative record." Fed. R. Civ. P. 26(a)(1)(E)(i). There is, in short, no "discoverable" information pertaining to the resolution of the habeas petition in this case.

Respectfully submitted

Paul J. McNulty
United States Attorney

By: Susan L Watt for
Lawrence R. Leonard
Managing Assistant United States Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, Virginia 23510
(757) 441-6331

Attorneys for Respondents

Paul D. Clement
Deputy Solicitor General
Alice S. Fisher
Deputy Assistant Attorney General

Dated: July 22, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Respondents' Rule 26 Statement was served, this 22nd day of July, 2002, by fax and by hand delivery addressed to:

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

Susan L Watt for
Lawrence R. Leonard
Managing Assistant United States Attorney

00000135

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUL 22 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

Before the Court is the "Respondents' Rule 26 Statement," in which the Respondents refuse to comply with this Court's July 18, 2002, Order, given in open court, requiring them to submit their Rule 26 disclosures by July 22, 2002. The statute under which the Petitioner seeks relief, 28 U.S.C. § 2241 & 2243, sets forth an expedited procedure for people being held without charge to seek judicial review of their confinement. Moreover, Federal Rule of Civil Procedure 26(a)(1)(E)(ii), upon which Respondents rely in not complying with this Court's Order, only exempts "proceeding[s] to challenge a criminal conviction or sentence." The problem at the heart of this case is that the Petitioner is not being confined pursuant to a criminal conviction; he is ostensibly being confined pursuant to executive action which may or may not be appropriate.

Be that as it may, I hope that it was haste rather than a deliberate mis-statement of the law that caused the Assistant United States Attorney to imply that the Petitioner was being held pursuant to a criminal conviction. The United States Attorney is in fact more intelligent than one might imagine from his so-called "Respondents' Rule 26 Statement" in which he totally ignores the Court's admonitions. It is noted that the person who executed this document, Susan Watt, has not appeared in this case, and therefore may not have known and been aware of what was happening. In any event, the Court will be

cautious, as the Fourth Circuit has admonished, and will follow the Court of Appeals for the Fourth Circuit, in its requirements.

In keeping with this spirit of caution, the Court suggests that the United States Attorney either submit the disclosures required by Rule 26, or make a proper motion for relief from Rule 26, by July 24, 2002 at noon. To totally ignore the Court's Order borders on an action which I am sure that Mr. McNulty, Mr. Clement, and Mr. Leonard would not particularly want.

In addition, the United States Attorney must not have read the same Opinion of the Court of Appeals as the undersigned did, and may have some information with which the undersigned is not acquainted. In response to the Respondents' proffer to the Court of Appeals of a "sealed declaration discussing the military's determination to detain petitioner Hamdi as an enemy combatant," the Fourth Circuit noted that "This declaration is factual in nature. As such, it should come first before the district court, not the court of appeals." Hamdi v. Rumsfeld, 2002 WL 1483908, *5 (4th Cir. July 12, 2002). This suggests that this case is not solely a matter of law, but that a factual record of some sort must be developed to understand whether or not the Petitioner is an illegal enemy combatant.

Finally, I would hope that Mr. McNulty, Mr. Clement, and Mr. Leonard would sign their own pleadings, for I would hesitate to call them to task for that which someone else unacquainted with the case may sign. To ignore the Court of Appeals and to ignore this Court is not cautious, but inflammatory, and if that is what they seek to do, they should sign their own pleadings.

The Clerk of the Court is **DIRECTED** to forward copies of both the petition and this Order both by fax and by U.S. mail, to all counsel of record, and specifically to Mr. McNulty, Mr. Clement, Mr. Leonard, and Ms. Watt, to the U.S. Court of Appeals for the Fourth Circuit, and to Yaser Esam Hamdi.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 22, 2002

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U.S. Department of Justice

United States Attorney
Eastern District of Virginia

8000 World Trade Center
101 West Main Street
Norfolk, Virginia 23510-1624

Tel 757/441-6331
Fax 757/441-6689

July 24, 2002

Via Hand Delivery

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, VA 23510

Re: *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*
Civil Action 2:02cv439

Dear Mr. Shelton and Mr. Kamens:

Without waiving their objections to the Court's order that they make initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), respondents make the following disclosures:

Rule 26(a)(1)(A) Individuals:

Michael Mobbs — Declaration
Special Assistant to the Undersecretary
of Defense for Policy
Department of Defense

Rule 26(a)(1)(B) Documents, Data Compilations and Tangible Things:

Declaration of Michael Mobbs

Documents or tangible things submitted in Civil Actions 2:02cv348, 2:02cv382 and 2:02cv439

Al Qaida Training Manual, available at www.usdoj.gov:80/ag/trainingmanual.htm.

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Other documents or tangible things that may be identified or developed during the course of this litigation.

Rule 26(a)(1)(C) Computation of Damages Claimed by Disclosing Party:

Not applicable

Rule 26(a)(1)(D) Insurance Agreements:

Not applicable

Sincerely,

Paul J. McNulty
United States Attorney

By: Susan L. Watford
Lawrence R. Leonard
Managing Assistant United States Attorney

FILED
JUL 31 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

The Court having received all required submissions in this case, it hereby **ORDERS** a hearing to be held on August 8, 2002, at 2:00 p.m., at which time the Court will hear argument on the materials submitted.

Furthermore, the Court **ORDERS** the government to produce the following materials, solely for in camera review by the Court, two days prior to the hearing, by noon on August 6, 2002. All the documents requested by the Court in this Order are to be redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status.

1) Copies of all Hamdi's statements, and the notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country, appropriately redacted for any intelligence matters;

2) A list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews, unless this information implies intelligence which might aid the enemy, in which event the material must show "name withheld" and dates, but not the addresses, of the unnamed individuals who conducted the interviews;

3) Copies of any statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender and transfer to forces of the United States, appropriately redacted for any intelligence matters;

4) A list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention, appropriate redacted for any intelligence matters;

5) The name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant and should be held in the manner in which the government is now holding him. In other words, with whom does the buck stop in this case for each of the matters listed in this question?;

6) The name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station, and a statement of the reason for this decision.

Pursuant to the decisions of the Court of Appeals in this case, the Court will not allow Hamdi to be interviewed by the appointed lawyer, or to be present at this hearing. Furthermore, to set minds at ease, this Court will proceed with caution and all due deference to the executive branch.

The Clerk of the Court is **DIRECTED** to forward copies of this Order, both by fax and by U.S. mail, to all counsel of record, and to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 31, 2002

U. S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General — Washington, D.C. 20530

August 2, 2002

VIA FACSIMILE

Ms. Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Rumsfeld v. Hamdi, No. 02-6895

Dear Ms. Connor:

In connection with Respondents' Emergency Motion for Stay Pending Appeal, filed June 13, 2002, in the above captioned appeal, Respondents submitted the declaration of Colonel Donald D. Woolfolk (a copy of which is attached hereto). In that declaration, Colonel Woolfolk explained the vital role that interrogations of enemy combatants such as Yaser Esam Hamdi play in ensuring the security of this Nation and its citizens, and that Hamdi's background suggested "considerable knowledge of Taliban and al Qaida training and operations" that could make Hamdi "have future value as a source of intelligence." Woolfolk Decl. at 2. Colonel Woolfolk also indicated that, at the time of his declaration, the Department of Defense had "voluntarily chosen to suspend active interrogations of [Hamdi] pending resolution of legal matters." Ibid.

I am writing to inform the Court that the Department of Defense has informed me that, in light of a recent change in circumstances, it has determined to resume interrogations of Hamdi for intelligence purposes. The Department of Defense has also informed me that, in its judgment, these interrogations, which resumed today, are compelled by important national security concerns. Should the Court deem it necessary, Respondents can provide a declaration ex parte and under seal concerning these changed circumstances. However, because the interviews are being conducted solely for intelligence purposes, and are unavailable to counsel for the Respondents, information concerning the interviews themselves could not be included in such a filing. Although we do not believe that this development affects the opinion issued by this Court, we wish to inform the Court so that the record may be clear on this point.

Accordingly, we request that this letter be distributed to the panel in the above-referenced case as soon as possible Thank you for your assistance in this matter

Very truly yours,

Paul D. Clement
Principal Deputy Solicitor General

Enclosure

cc: Hon. Robert G. Doumar
Frank W. Dunham, Jr.

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Declaration of DONALD D. WOOLFOLK

Pursuant to 28 U.S.C. 1746, I, Donald D. Woolfolk, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

(FOUO) I am a Colonel in the US Army with 30 years Active Federal Commissioned Service. I currently am the Deputy Commander, Joint Task Force (JTF) 170, Guantanamo Bay, Cuba, however, I am serving today as the Acting Commander. As such, I am directly responsible for the successful execution of the JTF 170 mission to fully exploit the intelligence value of terrorist personnel, Taliban, and al Qaida personnel detained worldwide. Currently, there are in excess of 450 detainees being held at the detainee camp at Guantanamo Bay, Cuba.

(U) The security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence. Put simply, intelligence saves lives. Nowhere has this proposition become more apparent than in our nation's current War on Terrorism. Absent a total commitment to intelligence gathering efforts, incidents like those that occurred on September 11th could become tragically common.

(U) The Department of Defense has expended considerable effort to develop effective intelligence techniques, particularly during Operation Enduring Freedom. The Department of Defense employs numerous means and methods to learn information from various sources that may assist everyone from the commanders in the field in Afghanistan to the police chiefs in small towns throughout the United States. A critical element of the intelligence process is that it must be continuous. The timely, effective use of intelligence provides this nation with the best chance of both achieving unqualified success in combating terrorism abroad and maintaining domestic tranquility at home.

(FOUO) A fundamental tool used in the gathering of intelligence is interrogation. This method of active intelligence gathering permits collection of information from sources with direct knowledge of, among other things, plans, locations and persons seeking to do harm to the United States and our citizens. When done effectively, interrogation provides information that likely could not be gleaned from any other source. Loss of this tool, in any respect, would undermine our nation's intelligence gathering efforts, thus crippling the national security of the United States. The United States does not employ any corporal means of coercion to gain information from persons being interrogated. Rather, the United States has adopted a humane approach to interrogation that relies upon creating an atmosphere of dependency and trust between detainees and the intelligence

Attachment C

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gathering staff assigned to that detainee. Over time, information is learned. The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the global War on Terrorism. This is because it is recognized that they unquestionably hold critical information that is crucial to our national security. A prime example of the effectiveness of this method of interrogation through dependency and trust can be found in the announcement this week of the U.S. Government's disruption and detention of a U.S. citizen working in coordination with al Qaida to detonate a "dirty bomb" in the United States. Knowledge and disruption of this plot may not have occurred absent effective intelligence gathered through interrogation.

(FOUO) Interrogation leading to the development of meaningful and usable intelligence is not static. The collection of intelligence is active and ongoing. As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented. We are now living in an age where our nation is engaged in international armed conflict against terrorism. Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Under such circumstances the need to maintain the tightly controlled environment, which has been established to create dependency and trust by the detainee with his interrogator, is of paramount importance. Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic. Should this occur, a critical resource may be lost, resulting in a direct threat to national security.

(FOUO) It has been brought to my attention that efforts are underway to provide detainee Yaser Esam Hamdi, an enemy combatant currently being detained in the Naval brig in Norfolk, Virginia, with access to counsel. Permitting such access to detainee Hamdi may create substantial harm to U.S. national security interests. Most importantly, the disruption occasioned by the insertion of outside counsel, will sever the intelligence gathering value of this detainee. As stated previously, the intelligence gathering process must be continuous. As new information is learned from other sources it serves as a new avenue of interrogation with detained enemy combatants.

(FOUO) Detainee Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaida training and operations. While we have voluntarily chosen to suspend active interrogations of this detainee pending resolution of legal matters, he would have future value as a source of intelligence. Granting access by counsel under these circumstances will not only disrupt the secure interrogation environment that the United States has labored to create, it will thwart any opportunity to develop intelligence through this detainee.

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2 of 3

BEST AVAILABLE COPY

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(FOUO) Further, providing counsel access to detainee Hamdi may have unintended consequences in a number of other ways. For instance, al Qaida training literature and intelligence gathering efforts have revealed that members have been trained in means of covert communication during periods of capture. As such, counsel could unwittingly provide information to the detainee, or be used by the detainee as a communication tool. This may open an information conduit between detainee Hamdi and members of al Qaida, the Taliban, or other terrorist groups against whom the United States is actively engaged in combat. Also, detainee Hamdi is the only detainee that has been under U.S. control in Afghanistan, Guantanamo Bay and Norfolk. Harmful information could be intentionally or unintentionally passed on concerning these facilities, thus increasing the threat to US forces and facilities in these areas. Finally, information from, or concerning, detainee Hamdi could be brought to the attention of terrorists who later themselves become detainees in Guantanamo Bay. Armed with any such knowledge, such "new" detainees may be able to poison the interrogation environment currently being maintained in Guantanamo Bay by information derived as a result of counsel access to Hamdi.

Signature of Declarant

Executed on 13 June 2002

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FILED: August 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-6895
(CA-02-439-2)

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi,

Petitioners - Appellees,

versus

DONALD RUMSFELD; W. R. PAULETTE, Commander,

Respondents - Appellants.

ORDER

Appellees have filed a motion to dissolve this Court's stay order of June 14, 2002. Appellants have filed a response in opposition.

The mandate in Hamdi v. Rumsfeld, No. 02-6895, shall issue forthwith and the stay is dissolved in order that the district court may proceed in strict compliance with our July 12, 2002 decision. In that decision, we directed the court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Hamdi v.

Rumsfeld, 2002 WL 1483908 (4th Cir. July 12, 2002). In accordance with the principles set forth in that opinion, the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Wilkins and Judge Traxler.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITIONER'S NOTICE OF SUPPLEMENTAL MATERIALS

In light of the Court's Order setting this matter for a hearing on August 13, 2002, on the sufficiency of the Declaration of Michael Mobbs, and in accordance with the Court of Appeals for the Fourth Circuit's Order dated August 8, 2002, counsel for Petitioner submits the attached materials which may be referred to during oral argument.

1. Letter dated August 5, 2002, from Esam F. Hamdi to Sen. Patrick Leahy;

2. ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002;

3. May 20, 2002, Transcript, Hamdi v. Rumsfeld, Case No. 2:02cv348 (E. D. Va.) (Miller, Mag. J.);

4. May 29, 2002, Transcript, Hamdi v. Rumsfeld, Case No. 2:02cv348 (E.D. Va.) (Doumar, J.);

5. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135;

6. Declaration of Frank W. Dunham, and attachment;

7. Matthew Dolan, *U.S.-Born Taliban Held in Norfolk*, Virginian-Pilot, Apr. 6, 2002, at A1;

8. Jess Bravin, *White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, Wall St. Jrnl., Aug. 5, 2002, at A4

9. *Who Mr. Hamdi Matters*, Wash. Post, Aug. 12, 2002, at B6

Respectfully submitted,

FRANK W. DUNHAM
Federal Public Defender

By: _____
Jeremy C. Kamens
Assistant Federal Public Defender
Virginia State Bar No. 41596
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
(757) 457-0800

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

Jeremy C. Kamens
Assistant Federal Public Defender

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August 5, 2002

To: SENATOR PATRICK J. LEAHY - CHAIRMAN
433 Russell Senate Office Bldg
(at Constitution and Delaware)
United States Senate
Washington, DC 20510

From: ESAM F. HAMDI
P.O. Box 240
Jubail
Saudi Arabia 31951

Dear Senator Leahy,

I am the father of an American citizen being held as an "enemy combatant" in Virginia. I am writing to you because he needs your help. Although he is an American citizen, my son has been termed an "enemy combatant". He has not been charged with any crime, nor has he been able to learn what evidence, if any, is being used against him. Furthermore, without legal counsel or judicial proceedings, my son has not been given the opportunity to defend himself or face his accusers – rights he should be granted under the Constitution.

His story is quite straightforward. My son is Yaser Hamdi, born in Baton Rouge, Louisiana, when I was working with Exxon Chemical in the United States. He was caught up in a local dragnet of non-Afghans in Mazar-e-Sharif in Afghanistan in November 2001. He was moved to Guantanamo Bay, Cuba, and then to Norfolk, Virginia when it was decided to search for his birth certificate.

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Yaser left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries. This was the first time he traveled on his own. Because of his lack of experience, he was trapped in Afghanistan once the military campaign began, although he was able to call

his mother before September 11, 2001 to inform her that he would be returning soon to Saudi Arabia. As you can see from the dates, he was in the area of Pakistan and Afghanistan less than two months prior to September 11th, which is not enough time to receive any military training, so how can he be considered an enemy combatant?

Yaser was caught at the same time Mr. John Walker Lindh was caught, but unfortunately his rights were not treated the same way. He was kept in Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he is an American citizen, then they moved him to the Norfolk jail.

Moreover, his lawyer is not allowed to see him, and we can not talk to him, whereas Mr. John Lindh moved directly from Afghanistan to the USA not going through Cuba and not staying for a long time in a jail in Afghanistan.

I am writing to you seeking your assistance as an American Senator to help in getting the proper treatment for my son's case and that he is treated fairly as an American citizen, regardless of the background of his parents or the country where he grew up.

Your assistance is highly appreciated.

Best regards,

ESAM F. HAMDI

PRELIMINARY REPORT OF THE
AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

August 8, 2002

I. INTRODUCTION

The September 11, 2001 attack on the United States not only shocked the nation but identified a new type of enemy: a group of individuals of varying nationalities operating with relative freedom in various countries throughout the world who are committed to murdering innocent men, women, and children found in or associated with the United States; destroying both government and private property in the United States, and creating a climate of fear among Americans at home and abroad. The United States reacted, as any nation would and must, with the support of the international community, to protect its people from future attack.

The unprecedented attack resulted in unprecedented responses by the government. Unable to know when and where another attack might occur, the government understandably felt the need to respond quickly and comprehensively to perceived dangers. In the process, the government confronted some United States citizens who carried arms with forces against whom the United States was engaged in battle and others who appeared to be allied with the enemy responsible for September 11th and committed to future assaults on the United States. This confrontation raised an enormously important and difficult constitutional question: what rights does a United States citizen detained by his or her government have when the citizen is alleged to be allied with an enemy group?

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As a nation we have struggled for more than 200 years to establish the proper balance under our Constitution between protection of liberty and individual rights. In time of war or threat of war, the balance may shift – appropriately – toward security, but from past experience we know that such a shift carries with it a danger of government overreaction and undue trespass on individual rights.

The recent cases of Yaser Hamdi[1] and Jose Padilla,[2] United States citizens detained as "enemy combatants," bring this potential danger into sharp relief and raise troublesome and profound issues. The government has taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[3]

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[1] Yaser Hamdi was captured during the hostilities in Afghanistan, and was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba in January 2002. When it was discovered that he was born in the United States and may not have renounced his citizenship, he was brought to the Naval Station Brig in Norfolk, Virginia in April 2002. He has been continuously detained there as an "enemy combatant."

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002 pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was declared to be an "enemy combatant" and transferred to the control of the United States military. The United States District Judge, at the request of the Department of Justice, vacated the material witness warrant, and Padilla was transported to the Consolidated Naval Brig in Charleston, South Carolina for detention as an enemy combatant. *See* Government's Motion to Dismiss Amended Petition for Writ of Habeas Corpus in *Padilla v. Bush, et. al.*, Case No. 02-Civ-4445-MBM (S.D.N.Y.).

[3] *See Hamdi v. Rumsfeld*, _____ F.3d ____ , 2002 WL 148390802 at *5 (4th Cir. July 12, 2002). We note that both the Hamdi and Padilla cases are in litigation, and facts and arguments may emerge that have not been made public. It is not our purpose to address these cases specifically, but rather to discuss the implications of them and the principles we believe should be considered as our nation confronts the broader questions they raise.

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The implications of these detentions are much broader than these two cases. Sadly, in what promises to be a long, complex, and difficult struggle with a worldwide terrorist network, this is not likely to be the last instance in which a U.S. citizen is believed to be or accused of acting in concert with such terrorists.

When a nation is at war, measures may seem reasonable that would never be acceptable in a time of peace. This is as true in the United States as in other countries. War, then, poses the challenge of how to protect a nation so that it may survive and prosper without damaging in the process the very liberty and freedoms for which the nation stands. As a distinguished Justice of the United States Supreme Court warned more than fifty years ago:

> ....we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

Justice Frank Murphy, concurring in *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946).

This is the challenge we faced before, it is the challenge we now face, and sadly it is a challenge unlikely to disappear in the future. How we deal with citizens suspected of terroristic activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of

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President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants to examine these issues.

The task force is chaired by Neal R. Sonnett, a past chair of the ABA Criminal Justice Section, and its members are: retired Brigadier General John S. Cooke, chair of the ABA Standing Committee on Armed Forces Law; Eugene R. Fidell, president of the National Institute of Military Justice; Albert J. Krieger, chair-elect of the ABA Criminal Justice Section; Stephen A. Saltzburg, a member of the ABA Task Force on Terrorism and the Law; and Suzanne E. Spaulding, chair of the ABA Standing Committee on Law & National Security.

The charge of the Task Force was to examine the framework surrounding the detention of United States citizens declared to be "enemy combatants" and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions.

We have not attempted to address the detention of foreign nationals in immigration proceedings,[4] or individuals held as material witnesses.[5] Nor have we considered – at least at this time – the issue of foreign nationals held as "enemy combatants" at the United States Naval

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[4] The government recently disclosed that, since September 11th, it detained a total of 751 individuals on immigration violations, and 74 people were still being held in INS custody as of June 13, 2002. See *Center for National Security Studies, et al. v. United States Department of Justice*, Case No. 01-2500 (Slip. Op. at p.7)

[5] Two United States District Judges in the Southern District of New York have analyzed the government's use of the material witness statute, 18 U.S.C. §3144 in post 9/11 cases and have reached very different results. Compare *United States v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002) and *United States v. Awadallah*, 202 F.Supp.2d 82 (S.D.N.Y. 2002), both decided on April 30, 2002 with *In re The Application of the United States For a Material Witness Warrant*, ___ F.Supp.2d___, 2002 WL 1592739 (S.D.N.Y. 2002). It is worth noting, however, that material witnesses have the right to appointed counsel. See *In re Class Action Application for Habeas Corpus*

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Base at Guantanamo Bay, Cuba.[4] Rather, our initial concern is whether the government can – or should – be able to detain American citizens indefinitely without charges and hold them incommunicado without a hearing and without access to counsel.[5]

This Report sets forth broad principles which the Task Force believes should govern such detentions. We hope and trust that our analysis, conclusions, and principles will generate discussion and debate on an issue which affects the very fabric of our democracy..

II. BACKGROUND

In the days following the horrific and evil acts of terrorism on September 11, 2001, our nation responded swiftly, aggressively, and with widespread national and international support. Congress did not officially declare war, but it enacted a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[6] The United

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on Behalf of All Material Witnesses in Western Dist. of Texas, 612 F.Supp. 940 (W.D.Tex.1985).

[4] Two United States District Courts have recently dismissed habeas corpus claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts. See *Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 1760825 (D.D.C. 2002).

[5] As we discuss further *infra*, we fully recognize the necessity under some circumstances to detain persons in order to prevent them from engaging in future terrorist attacks. But the power to detain has obvious implications for individual rights and liberty and therefore merits serious and careful examination.

[6] Public Law 107-40, 115 Stat. 224. The Preamble to the resolution states that the acts of September 11 were attacks against the United States that "render it both necessary and appropriate that

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Nations Security Council approved a resolution recognizing the United States' right to self-defense,[7] and NATO's North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

The September 11 attacks were viewed as both crimes and acts of war, and the United States has responded with both military operations and law enforcement actions. Under the circumstances, legal doctrines and principles from both domestic criminal procedure and international law, including the law of war, have been applied. Because of the unique nature of the attacks and our responses to it, it is not surprising that these doctrines and principles have been applied in new ways and have, to some extent, overlapped.

III. ANALYSIS AND LEGAL PRINCIPLES

A. Detention of "Enemy Combatants"

The government maintains that individuals declared to be "enemy combatants" may be detained indefinitely and have no right under the laws and customs of war or the Constitution to meet with counsel concerning their detention. The term "enemy combatant" is not a term of art which has a long established meaning. According to one commentator:

> Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international

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the United States exercise its rights to self-defense."

[7] See U.N.S.C.Res. 1368.

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> law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Solis, "Even a 'Bad Man' Has Rights," *Washington Post*, Tuesday, June 25, 2002, Page A19.

In the law of war, "enemy" generally describes an opposing state or quasi-state with which another state or quasi-state is at war.[10] In a war between states, the enemy consists of all the citizens of the other state. In wars involving non-states (typically insurgents or contestants in a civil war), who constitutes the enemy is less clear. The "enemy" as an institution or organization (e.g., an insurgent group or a band of partisans) usually does not have a legally cognizable status like a state.

Moreover, who "belongs" to this de facto organization rests not on a single, fairly objective, not easily changed factor like citizenship, but on each individual's allegiance as reflected in acts or even words. In many modern conflicts, including the present one, it is not

"War" may exist when a state of war has been declared or when activities involving the use of force rise to such a level that a state of war exists. Absent a declaration of war, there may be some uncertainty whether a state of war exists, depending on the level and nature of hostile activities. On September 18, 2001, Congress' Joint Resolution (Public Law 107-40, 115 Stat. 224) authorized the President "to use all necessary force against those nations, organizations, or persons he determines planned authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Based on this and U.S. combat operations in Afghanistan it may be concluded that the United States is at war with al Qaeda, the organization deemed responsible for the September 11 attacks.

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unusual for persons to hide their allegiance to the enemy for tactical or other purposes.

In the law of war, a "combatant" commonly refers to members of an armed force.[11] Members of a state's armed force are usually clearly distinguishable from civilians, including other government officials and employees. Members of the force normally wear uniforms and carry a distinctive identification card or document. In an organization, such as a rebel group, with an irregular armed force, the line between combatants and noncombatants is much less clear.[12]

See Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949

This is one reason for the requirements for a recognized chain of command and distinctive insignia.

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There is precedent for treating U.S. citizens as enemy combatants. *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2 (1942) was a case in which German soldiers smuggled themselves into the country, hid their uniforms and planned sabotage here before being caught.[13] They were arrested, prosecuted for what were regarded as crimes of war, convicted, and sentenced – six to death. The Court stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 317 U.S. 1, 30-31 (1942) (footnotes omitted). However, *Quirin* may not provide the clear precedential value claimed by the government: there was a formal Congressional "Declaration of War" against Germany, and all eight of the defendants were in fact uniformed members of the German military who donned civilian clothing after surreptitiously entering the United States to engage in sabotage.

Moreover, *Quirin* does not stand for the proposition that detainees may be held incommunicado and denied access to counsel, since the defendants in *Quirin* were able to seek review and they were represented by counsel. Since the Supreme Court has decided that even

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[13] *Quirin*, of course, arose during a declared war against nations who were identified enemies. Although two of the detainees claimed to have American citizenship, that claim was not central to the case, and the Supreme Court had little difficulty in finding that Americans who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces of the enemy country

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enemy *aliens* within the United States are entitled to review, that right could hardly be denied to United States citizens.[14]

In *In re Territo*, 156 F.2d 142 (9th Cir. 1946), a U.S. citizen was captured in Italy while serving in the enemy Italian army and held as a POW in the United States. The court upheld the denial of his petition for writ of habeas corpus, stating, "all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."

Quirin and *Territo* arose in World War II. Little question existed about who the enemy was or whether the *Quirin* defendants or Territo were members of the enemy armed forces. Thus, these decisions turned not on whether the detainees were enemy combatants, but on whether enemy combatants – even if U.S. citizens – could be detained and tried by the military. In the current situation, these lines are less clear, both in general and in application in specific cases.

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[14] "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.' Id., 317 U.S. at 25, 63 S.Ct. at 9, 87 L.Ed. 3. This we did in the face of a presidential proclamation denying such prisoners access to our courts." *Johnson v. Eisentrager*, 339 U.S. 763, 784-85, 70 S.Ct. 936, 951-52 (1950) (Justice Black dissenting)

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For this reason, the power to label a citizen an "enemy combatant" is potentially very broad.

B. Application of United States Law

Neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks have addressed the detention of United States citizens as enemy combatants. That is an important consideration, since existing law calls such detention into serious question.

Title 18, §4001(a) of the United States Code provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The legislative history indicates that this statute applies in the case of any detention of U.S. citizens, and is not limited to the control of civilian prisons:

> **The twofold purpose of the amended bill is (1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use.**

House Report No. 92-116, p. 1435, April 6, 1971, Cong. Record Vol. 117, (1971). The House Report explained that specific repeal of the Emergency Detention Act[15] and that the "mere continued existence" of the act had "aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold

[15] The Act had been enacted at the beginning of the Korean War in order to allow for the "apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage." *Id.* at 1436

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explained in *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086 (1969):

> **The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.' U.S.Const., Art. 1, s 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.**

The Court further commented:

> **There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom** contrary to law.

Id., 394 U.S. at 292, 89 S.Ct. at 1087.

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C. The Geneva Conventions

The four Geneva Conventions of 1949, to which the United States is a party, provide the general framework for analysis of the grounds and procedures for detention and treatment of enemy combatants. The treatment of captured combatants during an armed conflict is covered by the Third Geneva Convention Relative To The Treatment of Prisoners of War, which defines prisoners of war (POWs) and sets forth the framework for their protection. Persons not entitled to POW status, including so-called "unlawful combatants," are nevertheless entitled to protections provided by the Fourth Geneva Convention Relative To The Protection of Civilian Persons in Time of War. However, in cases in which a civilian has engaged in "acts hostile to the security of the State, such individual shall not be entitled to claim such rights and privileges ... as would ... be prejudicial to the security of such State."

Thus, certain lines of demarcation have been drawn that distinguish what is expected of government in various circumstances. It is relatively clear that when we are at war fighting against a declared enemy, as in World War II for example, enemy prisoners who are captured on the battlefield or in the combat arena are declared Prisoners of War and entitled to protection as such. Those prisoners must be treated in accordance with the Convention and have rights under the Convention. They are not criminal defendants; they have no right to counsel; they may be questioned but need not provide any information other than name, rank serial number and date of birth. Prisoners of war do have the right, subject to censorship for security purposes, to correspond with others outside the prison.

Some individuals are captured during war on the battlefield or in the combat arena but do

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not qualify as prisoners of war. Such persons are those who have committed a belligerent act and have been captured, but are not part of an organization that qualifies its members as Prisoners of War. Under some circumstances the Fourth Geneva Convention permits detention of civilians in a war zone.

Since it is not always clear whether an individual captured during a war qualifies as a Prisoner of War, Article 5 of the Geneva POW Convention[19] provides that when there is doubt about the status of a captured individual, he or she will be treated the same as a Prisoner of War until such time as his or her status has been determined by a competent tribunal.[20] The Article 5

[19] Article 5 states:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[20] The United States has substantial experience with Article 5 of the Convention; for example, it established Article 5 tribunals for thousands of individuals during the Gulf War. See *Operational Law*

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process, however, is not directly relevant to our examination of the treatment of U.S. citizens who are detained in this country.

D. International Human Rights Laws and Treaties

Any analysis of the treatment of enemy combatants must also consider a variety of other recognized international agreements which are relevant to our analysis, particularly to the issue of access to counsel. They include:

Handbook, JA 422 (Charlottesville 1977) at 18-8

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1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted in 1948, has been strongly supported by the United States. Indeed, President Bush proclaimed December 9, 2001 as "Human Rights Day & Bill of Rights Week"[21]

Article 8 declares that everyone "has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and Article 9 provides that no one "shall be subjected to arbitrary arrest, detention or exile."

2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, requires that "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." More important, Principle 18 provides:

1. A detained or imprisoned person shall be entitled to communicate

[21] The Proclamation, issued for the Declaration's 53rd anniversary, stated: "The terrible tragedies of September 11 served as a grievous reminder that the enemies of freedom do not respect or value individual human rights. Their brutal attacks were an attack on these very rights." President Bush called on "the people of the United States to honour the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our nation and throughout the world as we move into the 21st century."

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and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

3. International Covenant on Civil and Political Rights (ICCPR)

The International Convention on Civil and Political Rights was adopted and opened for signature, ratification and accession by U.N. General Assembly resolution 2200A (XXI) on December 16, 1966, and became effective in 1976, following ratification by the necessary number of states.[22] Article 14 of the ICCPR describes certain standards and procedures that should be

[22] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

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used in all courts and tribunals.[23]

IV. DISCUSSION

The attack on the United States on September 11, 2001 – as well as other attacks on United States embassies, personnel, and property abroad – raise new and difficult questions for our legal and political systems. Once it began, the hijacking of planes and wanton and willful taking of lives could not go unanswered. The openly declared goal of Al Qaeda to inflict a holy war upon the United States could not go unrecognized. No President or Congress could ignore the threat and pretend that further attacks should not be expected.

The need for action was undeniable. Congress authorized the President to respond. The

[23] At the American Bar Association Midyear meeting in February 2002, the House of Delegates considered and adopted a Report and Recommendation relating to the November 13, 2001, Military Order Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Recommendation 6 urged the President and Congress to assure that the law and regulations governing any tribunal would "[r]equire compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of *ex post facto* application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances."

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United Nations recognized the need for the United States to act in self-defense. Accordingly, the President committed American armed forces to do battle with the Taliban and Al Qaeda in Afghanistan. Whether this was a declared war or not, it was approximately as clear who the enemy was in Afghanistan as in previous conflicts: namely, the enemy were the Taliban fighters who repressed the people of that country and the Al Qaeda forces who benefitted from Taliban protection while providing substantial resources to support the Taliban forces.

Many suspected Taliban and Al Qaeda forces or supporters who were captured in battle have been detained, and questions about those detainees abound. Most knowledgeable people recognize that they are difficult questions to answer and involve the law of war, international law, and treaty obligations. Even so, there is concern among many Americans about the prudence, if not the legality, of prolonged incommunicado detention of a large group of people far removed from the battle in which they were captured.

As a society, we know that America is a land in which dissent is a fundamental right, but we take pains to assure that dissent is not confused with treasonous acts. We do not lightly presume that Americans, even those who protest and complain about their country's policies, are "enemies."

If an American citizen who is detained as a Prisoner of War or as an illegal combatant is subsequently prosecuted for treason or for another crime against the United States, that citizen will have the benefit of the constitutional protections afforded all defendants in American criminal prosecutions. The right to counsel, the privilege against self-incrimination, the right to jury trial and other familiar rights will attach once prosecution commences.

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There is reason for confidence, therefore, that an American who is charged with a crime against the United States, even one involving the taking up arms against the United States, will receive the full panoply of rights traditionally afforded criminal defendants. Neither the Executive nor the Congress has sought to interfere with the exercise of these rights, and there is no indication that Due Process will be denied those charged with federal crimes.

But, there is genuine reason for concern about a President's – or anyone's – power to unilaterally declare that an American citizen who is arrested in the United States or elsewhere far from any battlefield or combat arena is part of the enemy and thus may be treated in the same way as enemy seized in battle. Indeed, it is both paradoxical and unsatisfactory that uncharged U.S. citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses, like John Walker Lindh, a U.S. citizen, or foreign nationals like Zacarias Moussaoui, the alleged "20th hijacker" and Richard Reid, the alleged "shoe bomber."

The war on terrorism requires that new questions be asked. With whom are we at war? Who defines the enemy? How does one conduct war against individuals or groups of individuals who swear no allegiance to any nation and whose affiliations to each other are not always clear? What qualifies an individual as a combatant? Who has the right to negotiate to end the war? Who defines how long the war will last? Where is the war actually being fought?

Without knowing the full and complete answers to these broad questions, it is not clear how to answer the narrower questions: May the Executive detain an American citizen or any other person lawfully in the United States as an "enemy", a "combatant", or an "enemy combatant" on the basis of a unilateral determination that the individual is "connected to", a

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"supporter of"; a "member of"; or an "aider, abettor or coconspirator of" an individual or group that has participated in an attack on the United States or expressed support for such an attack?

What standard – reasonable suspicion, probable cause, etc. – applies to such detention? What time limit, if any, applies to such detention? Is there any judicial review available to a detainee? If a decision is made to detain, must that decision be periodically reviewed? Does a detainee have a right to consult with counsel with respect to detention? While being detained?

U.S. courts have generally deferred to military judgment concerning POW status and related questions. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hamdi v. Rumsfeld*, ___ F.3d ___ (July 12, 2002).[24] This deference flows from the President's and Congress' primary responsibility for foreign affairs and the prosecution of war, and from the potential damage of judicial interference in military operations. However, the same is not true in circumstances involving U.S. citizens not on the battlefield or in the zone of military operations. See *Ex parte Milligan*, 71 U.S. 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).[25]

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[24] See also *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

[25] It should be noted that POWs are entitled to and generally can communicate with outsiders. Through such communications they can gain the services of an attorney who can seek relief in an appropriate court. POWs may also communicate, through their chain of command, with representatives from neutral states and international organizations, and in this way raise issues concerning their detention.

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Moreover, the federal judiciary has little experience with detention of Americans as enemy combatants outside a declared war, with nations as enemies, and with captured soldiers. *Ex parte Milligan* and *Ex parte Quirin* can be cited for and against judicial involvement in Executive determinations as to combatants, but the reality is that neither decision addresses whether there can be detentions of Americans or lawful residents without some form of judicial review.[26]

V. RECOMMENDATIONS

We fully recognize that these are very difficult and complex issues. The stark reality is that there is no universal consensus as to the right answers to either the broad or the narrow questions now facing our nation. With the disquieting recognition that the battles of the future could focus on individuals and groups spread among as well as on nations themselves, we nonetheless believe that there are certain principles that should and could receive support from those who appreciate the need to assure that we do not lose our sacred liberties and freedoms while we fight to save them.

The Task Force therefore recommends that the following principles be followed with respect to the treatment of U.S. citizens declared to be enemy combatants:

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[26] History has not been kind to the Japanese internment cases, which upheld detention of American citizens and lawful residents. Judicial review was ultimately provided, internment was sustained, and the decisions have been questioned as much as any in American law. Indeed, Congress passed the Civil Liberties Act of 1988 "to provide a Presidential apology and symbolic payment of $20,000.00 to the internees, evacuees, and persons of Japanese ancestry who lost liberty or property because of discriminatory action by the Federal government during World War II." See http://www.usdoj.gov/kidspage/crt_redress.htm.

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1. The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants

The administration should explain, more fully and formally than it has, the basis for detaining someone as an enemy combatant, especially Americans seized far from any recognized battlefield or combat zone.

This is important as a matter of domestic and international law and public support. Actions taken today will serve as precedents forever. Regardless of the wisdom and good faith with which actions are taken, detention without process in a few cases may be used as justification by others for much broader use of such detention.

By better explaining the rationale for such detention (even recognizing that security concerns may limit what can be made public), the government can win support – assuming its reasoning is sound – and can cabin the authority should others try to extend it inappropriately. There may be substantial reasons for such detentions that would be consistent with domestic and international law, but it is also possible that the case for detention is problematic and might create a dangerous precedent.

The Administration has not yet attempted to explain what procedures it believes should be required to assure that detentions are consistent with Due Process, American tradition, and international law. It cannot be sufficient for a President to claim that the Executive can detain whomever it wants, whenever it wants, for as long as it wants as long as the detention bears some relationship to a terrorist act once committed by somebody against the United States. Short of such a claim, what are the limits?

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2. Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens

Congress, in coordination with the Executive branch, should examine the issue of detaining U.S. citizens as enemy combatants, and should enact legislation establishing clear standards and procedures governing the detention and treatment of U.S. citizens detained as enemy combatants. This is particularly necessary in light of our discussion of 18 U.S.C. §4001(a), *supra*.

The Task Force acknowledges the need to give proper deference to the Executive Branch in times of crisis, but neither the Congress nor the Courts should hesitate to question actions which may impact upon or violate long cherished constitutional principles. As the Washington Post recently observed in an editorial:

> . . . the government's actions in this latest case cut against basic elements of life under the rule of law. If its positions are correct, nothing would prevent the president – even in the absence of a formal declaration of war – from designating any American as an enemy combatant. Without proving the correctness of the charge before a court, the military could then detain that person forever. And having done so, it could prevent that detainee from hiring a lawyer to argue that the government, in fact, has it all wrong. If that's the case, nobody's constitutional rights are safe. The administration owes the country a more thoughtful balance; Congress's role – the patriotic thing to do – is to help find it.

Editorial, "Detaining Americans" Washington Post, Tuesday, June 11, 2002, Page A24.

Congress should also maintain continuing oversight of detention of U.S. citizens to assure that such detentions are consistent with Due Process, American tradition, and international law.[37]

[37] As part of its oversight authority, Congress should consider requiring periodic reports from the Executive, and should include a provision in the proposed Homeland Security Department providing the Inspector General with specific authority to investigate allegations regarding denial of access to counsel

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As Sen. Russell Feingold (D-WI) observed during a United States Senate Judiciary Committee hearing:[28]

> ...I do think we need to learn a lesson from this history to question our government when it appears to be overreaching. Such questions are not unpatriotic and should not be viewed as an inconvenience by the Executive Branch. They are a crucial tool for Congress to play its constitutional role in protecting the great heritage of this country and the rule of law.

or violations of constitutional rights arising from continued detentions.

[28] Senate Committee on the Judiciary, December 4, 2001. http://judiciary.senate.gov/member_statement.cfm?id=128&wit_id=85

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3. Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention

As set forth above, United States citizens who are detained by the Government have a right under the Constitution to seek release from their detention through a petition for writ of habeas corpus, a fundamental right which Congress has not suspended. Citizen detainees who have not been charged with violations of United States criminal laws or the law of war should therefore be afforded a prompt opportunity for judicial review of the basis for their continued confinement.

4. Citizen Detainees Should Not be Denied Access to Counsel

The most complex issue examined by the Task Force is that of access to counsel. We agree that a United States citizen detainee should not be denied access to the courts and he or she should, at the very least, have the right to contact an attorney in order to seek habeas corpus relief.

We also agree, however, that the 6th Amendment right to counsel does not technically attach to uncharged enemy combatants, and we recognize that, depending on the geographical location and the state of hostilities, there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or dangerous.[29]

While we are mindful of such concerns, we do not believe that citizens detained within the United States, far from the battlefield, fall within that category. Indeed, the right to prompt judicial review may well be hollow unless citizen detainees are afforded meaningful access to

[29] For example, no reasonable person would suggest that the battle should pause while a combatant captured and detained on the battlefield is granted a visit from his or her lawyer.

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counsel and to the effective assistance of counsel in order to appropriately challenge their detention.

Government concerns that affording access to counsel may impede the collection of intelligence are not, in our view, so compelling that they justify denial of access to assistance of counsel. Nor are concerns that counsel might be used by detainees to facilitate communications with others. We have confidence that our nation's lawyers can provide effective representation without breaching security. When government practices result in indefinite incommunicado detention, they must be weighed against the requirements of the rule of law and the sacred tradition of providing our nation's citizens with full Due Process rights.

5. Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants

Finally, we urge the Executive and Legislative branches, in establishing and implementing procedures to govern the detention of U.S. citizens held as enemy combatants, to give full consideration to the impact of its policies as precedents in the use of international legal norms in shaping other nations' responses to future acts of terrorism.

VI. CONCLUSION

The Task Force respects and supports President Bush and his administration in their efforts to root out terrorism and assure our homeland security. Of course, we should have the means to prevent more attacks like those of September 11. At the same time, there must be safeguards to protect the innocent and prevent possible abuses of power.

Since our Nation's founding, it has been a bedrock principle of our Democracy that is it

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the duty of the courts to protect the constitutional rights of citizens from overreaching government authority—even when that authority is well-intentioned, and regardless of how unpopular or hated those citizens might be. "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."[30]

We would do well to heed the admonition of Justice Murphy in *Duncan v. Kahanamoku*, 327 U.S. 304, 335:

> Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy.

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[30] *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Justice Murphy, concurring.)

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The ABA Task Force on Treatment of Enemy Combatants will continue to review and analyze these issues, and the American Bar Association stands ready to be of assistance in any way to help establish standards and procedures to ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[31]

We must get this right. The people of this great country deserve no less.

[31] As Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

SUMMARY OF RECOMMENDATIONS

1. **The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants**

2. **Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens**

3. **Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention**

4. **Citizen Detainees Should Not be Denied Access to Counsel**

5. **Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants**

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ABA Task Force on Treatment of Enemy Combatants

Chair

NEAL R. SONNETT is a past chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and is a member of the ABA Task Force on Gatekeeper Regulation and the Profession. He is vice-president of the American Judicature Society and past president of the National Association of Criminal Defense Lawyers. The *National Law Journal* profiled him as one of the "Nation's Top White Collar Criminal Defense Lawyers" and selected him three times as one of the "100 Most Influential Lawyers In America." He is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida.

Members

JOHN S. COOKE is the Director of Judicial Education at the Federal Judicial Center. He retired from the United States Army in 1998 as a Brigadier General after twenty-six years of service in the Judge Advocate General's Corps. He served as Chief Judge, U.S. Army Court of Criminal Appeals, Commander, U.S. Army Legal Services Agency, Judge Advocate (senior legal advisor) for U.S. Army forces in Europe, and Deputy Commandant, The Judge Advocate General's School. He is outgoing chair of the ABA Standing Committee on Armed Forces Law and served on the ABA Task Force on Terrorism and the Law.

EUGENE R. FIDELL is president of the National Institute of Military Justice and a partner in the Washington, D.C. firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP. He served on the Code Committee on Military Justice and the Advisory Board on the Investigative Capability of the Department of Defense, and has taught Military Justice at Yale Law School. He is coeditor (with Dwight H. Sullivan) of Evolving Military Justice (Naval Institute Press 2002) and edited NIMJ's forthcoming Annotated Guide to the Procedures for Trials by Military Commissions (LEXIS/NEXIS Matthew Bender 2002).

ALBERT J. KRIEGER is a nationally renowned criminal defense trial attorney now in his 54th year of practice. He is the incoming chair of the ABA Criminal Justice Section and a past president of the National Association of Criminal Defense Lawyers, which he represents in the ABA House of Delegates. He served two terms on the ABA Criminal Justice Standards Committee, and he has been honored by local, state, and national bar associations throughout the nation for his lifetime of contributions to the adversary system of criminal justice.

STEPHEN A. SALTZBURG is Howrey Professor of Trial Advocacy, Litigation and Professional Responsibility at the George Washington University Law School. He served as Associate Independent Counsel in the Iran-Contra investigation, and is a former Deputy Assistant Attorney General in the Criminal Division. He serves in the ABA House of Delegates from the Criminal Justice Section and is on the Council of the Litigation Section. He served on the ABA Task Force on Terrorism and the Law, and is a member of the ABA Task Force on Gatekeeper Regulation and the Profession.

SUZANNE SPAULDING currently serves as chair of the ABA Standing Committee on Law and National Security. She has served as Executive Director of the National Commission on Terrorism (the "Bremer Commission") and Executive Director of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction. She is a former Deputy Staff Director and General Counsel for the Senate Select Committee on Intelligence, and a former Assistant General Counsel for the Central Intelligence Agency.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

YASER ESAM HAMDI
Petitioner,
FRANK W. DUNHAM, JR., As Next Friend of Yaser Esam Hamdi,
Petitioner
v.
DONALD RUMSFELD, Secretary of Defense
Respondent,
COMMANDER W.R. PAULETTE
Respondent.

CIVIL ACTION
NO. 2:02cv348

TRANSCRIPT OF MOTION FOR TIME EXTENSION

Norfolk, Virginia

May 20, 2002

Before: THE HONORABLE TOMMY E. MILLER
United States Magistrate Judge

Appearances:

OFFICE OF THE FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR.
LARRY W. SHELTON
GEREMY C. KAMENS
Counsel for the Petitioner

LAWRENCE R. LEONARD
Assistant United States Attorney
Counsel for the Respondent

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THE DEPUTY CLERK: Case No 2:02cv348, Yaser Esam Hamdi versus Donald Rumsfeld, Secretary of Defense, et al.

Mr. Dunham, is the petitioner ready to proceed?

MR. DUNHAM: Yes, we are, Your Honor.

THE COURT: Mr. Leonard, is the respondent ready to proceed?

MR. LEONARD: Yes, sir, we are.

THE COURT: Mr. Leonard, this is your motion for an extension of time in which to file the answer to the petition for habeas corpus. I would like to comment on one footnote you have in there. We do hundreds of habeas corpuses in this court every year. I frequently give the United States 60 days to respond and -- the ones that are referred to me, the 2241 parole issues. The reason for that, or one reason is that the defendant has already been tried, he's convicted, he's had an appeal and a right of writ to the Supreme Court, and now he's back through going through another -- he's already had administrative dealings with the parole board. So at least that person has had due process granted to him. So I don't think that's a good analogy as to the amount of time that should be granted in this case where it's alleged to have, at least in the petition, and I have no information other than what's in the petition, that there has been no due process and this person is an American citizen. So I think it's apples and oranges in that type of habeas, and I wanted to mention that

before you started.

MR. LEONARD: All right. Very well, Your Honor. I appreciate that, and my purpose in referencing that was simply to point out that there are a myriad of reasons why the court can exercise its discretion to provide a lengthier period of time than might be provided for under Rule 82, and Rule 84 gives the court that discretion.

THE COURT: 81.

MR. LEONARD: Excuse me, 81.

THE COURT: Subsection (a)(2).

MR. LEONARD: Thank you. And the court has in the past exercised that discretion. I recognize the issues here are different from the typical habeas petition that the court sees.

On that note I would point out that the petitioner in this case, specifically Mr. Hamdi, I believe it's undisputed, was seized as a combatant in Afghanistan. He was seized by the military in a foreign action. Excuse me, in a military action on a foreign battlefield.

THE COURT: I'm not sure if that's disputed or not, but we will hear from Mr. Dunham on that.

MR. LEONARD: All right. I am taking that from the allegations in the petition. Mr. Hamdi was seized in Afghanistan, and there was an ongoing military action between the military forces of the United States and combatants

representing the Taliban and al Qaida. It was in that context that Mr. Hamdi has made his way into the custody of the United States military.

It is in that context that the petitioner raises issues which are of extreme importance to both the national security and the national defense of this country. For that reason the respondents are seeking merely a 21-day extension of time to address the legal issues that have been raised in the petition.

Additionally because of the importance of these issues, it is necessary to coordinate the efforts and the input from various levels of the executive branch: the Department of Justice, including the criminal division, and the Soliciter General's Office; the Department of State; and the Department of Defense. Inasmuch as the court has provided only nine days to respond to this petition --

THE COURT: Which is triple the amount that Rule 81 provides for, and the statute 28 U.S.C. 2243, the second paragraph provides for three days, and I considered some of what you are raising in allowing nine days for the response on my own motion.

MR. LEONARD: I understand.

THE COURT: But you are right, I do have discretion.

MR. LEONARD: All right. And it's our position that the court should exercise that discretion to provide a total of

30 days that would allow both the coordination necessary for the various arms in the executive branch to prepare a thorough and efficient response and also to allow sufficient time to address these important issues because, as I said, we are dealing with an individual who was seized on the field of battle in a foreign land by the United States military. The case law from the Supreme Court on down is replete with cautions that the judiciary should exercise a great deal of restraint before injecting itself in these kinds of issues, which is not to say that the judiciary should stand by totally, but merely that in this case a 30-day total period of time to provide a response to the petition is certainly reasonable.

THE COURT: How long has this person been in custody? Do you have any idea?

MR. LEONARD: My understanding is that the United States military acquired custody of Mr. Hamdi approximately five months ago.

THE COURT: And according to the petition, I think he's been in the United States in this district since April 6th. I believe that's what the petition says.

MR. LEONARD: I think that's correct.

THE COURT: Are you finished?

MR. LEONARD: Yes, Your Honor.

THE COURT: Before you sit down, there are two issues raised by the response filed by the Public Defender, and they

want two things: Provide timely and reasonable access to the petitioner. I assume by their office and only their office, but we will hear about that, and to agree not to move the petitioner during the pendency of this petition. Do you care to respond to either of those issues now?

MR. LEONARD: Just generally, Your Honor. With respect to the Public Defender's request for access to Mr. Hamdi, it's the position of the respondents that Mr. Hamdi is an unlawful enemy combatant, and as such that's why he's being held under these circumstances. If the government --

THE COURT: You say that's the position, but until you answer, I don't know what your position is.

MR. LEONARD: Well, that's correct, Your Honor, and that ties me to what I was going to say next, which is, therefore, the right to access to counsel is tied up in the merits of the petition for if the government is correct, then there is no right to counsel. So it would seem to me to be putting the cart before the horse to provide that access which the petition may later determine is unwarranted.

It's also the position of the respondents that access to counsel might interfere with the important national security purposes for which we are holding Mr. Hamdi. With respect to the second issue about moving Mr. Hamdi, of course he's in the custody of the United States military, and so at this juncture I can't make any representations one way or the other about any

reasons that may come up which might require and necessitate relocating Mr. Hamdi from one location to another.

THE COURT: All right. Mr. Dunham, Mr. Shelton whoever is going to argue?

MR. DUNHAM: Your Honor, we try not to be unreasonable when the other side calls us and asks for more time because we frequently need the same courtesy, but in this situation we simply asked to have access to Mr. Hamdi in that interim.

As the government represents, they say this is a matter of highest national importance. They need consultation at the various highest levels of government. I note that Mr. McNulty, who I had conversations with about this case, is not here this morning. But in my conversations with him I did say, you know, we might not oppose a motion for an additional period of time if we could have access to our client and if they would agree that we would not be prejudiced because the status quo would be maintained. In other words, they would not move him and we would be allowed to see him.

Now, it seemed to me that being allowed to see him is important. I mean, the issue that we can't have access to him because he's an unlawful enemy combatant. I mean, it seems to me that the United States has not stated that that's why they are holding him. They haven't answered us. They say they can't answer us. They can't answer us in nine days as to the

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reason why they are holding Mr. Hamdi. Yet if we could see him, Mr. Hamdi might tell us, like some of these our fundamental Islamist persons that have been caught up in all of these 9-11 events, he might tell us I don't want this, in which case this whole matter would go away. He may say I don't want an infidel Christian lawyer representing me on a habeas corpus petition in the United States district court.

I mean, we are here because we can't get access to him and we've had to act at the request of his father, and it seems to me foolish for the United States to come into court and say this is a matter of national significance and not allow Mr. Hamdi, who's a U.S. citizen to have access to a lawyer.

THE COURT: Is that undisputed, that he's a U.S. citizen?

MR. DUNHAM: The government did not dispute it in their remarks. We provided his birth certificate to the court. I mean, he's a U.S. citizen and he ought to have the right to counsel in a matter such as this, and it seems to me that allowing him to have the right to counsel could solve a bunch of problems. At least if he says, hey, I want you to go forward for me, it at least allows us to find out what his side of these things are. Otherwise, you are going to get a one-sided presentation from the United States as to what happened. I mean, he could have been a mere bystander as to what was going on over there at the time he was gathered up in

some group arrest or something. We don't know what his story is, and I think in order for this court to proceed with this matter, we have a right to find out what his side of things are. He's right here in Norfolk.

THE COURT: Do you agree with Mr. Lechard that if he in fact is an unlawful enemy combatant, that he has no right to counsel?

MR. DUNHAM: No. He's a U.S. citizen, and I believe he would have a right to counsel. They would have to show me where a U.S. citizen who's arrested by the military doesn't have the right to have a lawyer. I believe he does.

Now, I also believe that not only do we need to see him to find out if he wants us to proceed and to find out what his side of things is, he may well contest that he was an enemy combatant. He may want to be able to present evidence to this court that he was not.

So our position is that the court's nine-day response time was reasonable given the fact that we've not been allowed to see the client. I point out to the court that on April 1[7] I wrote to the Commander Paulette who has custody of Mr. H[amdi] at the Navy brig, and I didn't ask him, you know, to re[lease] him. I asked him could we please see him, and I got [a] five days later saying, "We will provide you a res[ponse] course." And as we stand here today, we still h[ave no] response as to whether or not we can see him.

small step to take, and I believe that if the court is going to grant any additional time to the government, it should come with an order that we be allowed to see Mr. Hamdi and that he not be moved in the interim. Otherwise, we would ask the court to hold to the original schedule because the delay is prejudicial to Mr. Hamdi under these circumstances.

THE COURT: Even if he is moved, the Supreme Court of the United States has said that if the petition has been filed and served -- and it's been an adventure getting it served on the commander of the Naval brig. I can tell you that from the Marshal's standpoint. It's been served on him. It's been served by certified mail on Secretary Rumsfeld, and the Supreme Court says even if he is moved, there is still jurisdiction in this court to continue with the petition. So I suspect if they put him on Diego Garcia, which is about as far away from here as I can think right now, the jurisdiction would still lie according to the Supreme Court. So is that what your concern is about, moving him, or is it you-all's, as attorneys, access to him?

MR. DUNHAM: I believe we have jurisdiction over everybody we need to have jurisdiction over and they can't make this case disappear from this court the way they've tried to make Mr. Hamdi disappear. But the problem is that we wouldn't be able to see him. They could move him to a place that would be virtually impossible for counsel to have access

to him. I mean, if they moved him to Guantanamo Bay or if they moved him to Diego Garcia, as you posited, you know, we would have to travel to great extremes in order to see him. It would be an inconvenience to our office, it would be unwarranted expense to the United States, and it would also make matters difficult for the court if it needed to get the gentleman back here for testimony.

Now, I believe the court is well within its discretion and prerogative to order the United States at this point not to move the man and to let him see counsel. I have a national security clearance as high as I need to be involved in these matters at the present time, and I am willing to sign any protective order the United States proffers with regard to the content of any communication I receive from this gentleman. There can be absolutely no harm to the interests of the United States in letting him see a lawyer.

I mean, it's one of our fundamental rights, and he is a U.S. citizen. It just is one of the things that really depresses me that we have held this gentleman since January and we've held him in the eastern district since April 6th, and he's a U.S. citizen and he hasn't seen counsel. I don't know whether he's been told he has a right to that. I don't know what he's been told. Nobody has represented on behalf of the United States that we told him he could have a lawyer and he doesn't want one. So, Your Honor, I would request that if any

consideration is being given to giving the government more time, that it be coupled with an order that he not be moved and that we be allowed to see him.

MR. LEONARD: Your Honor, I note that Mr. Dunham has very artfully argued the merits of the petition in response to a simple request for an extension of time. I will state for the record that the fact that I did not comment on the specific allegations of the petition should not be regarded as any kind of acquiescence in those allegations. I make no representation one way or the other whether or not Mr. Hamdi is a United States citizen. That matter is still being investigated.

With respect to the right to counsel, surely Mr. Dunham cannot be claiming that enemy combatants seized on a field of battle are entitled to attorneys. Now, further discussion of that issue, again, is tied up in the merits of the petition.

The position of the respondents is simply that allowing a total of 30 days or an extension of 21 days, to thoroughly address those legal issues is not going to in any way interfere with Mr. Hamdi's further rights to articulate the merits of the defense or the merits of his habeas action and will certainly interfere with the government's abilities, specifically the military's ability, to deal with individual combatants that they have seized on the battlefield.

And finally, there's another issue with respect to

Mr. Dunham's request for access, and that has to do with whether or not the Public Defender was properly appointed as counsel in this case to begin with.

As the court's aware under 3006(a), only persons who are financially eligible, who shall demonstrate a financial need are entitled to counsel. My review of the file indicates that the only evidence proffered in support of that financial statement were two very short affidavits: one from an attorney in Qatar and one from Mr. Hamdi's father, neither of which were in the format of a traditional informa pauperis paperwork usually submitted in requests for counsel.

THE COURT: Well, then we will bring Mr. Hamdi here tomorrow or this afternoon, and I will put him under oath and find out if he's indigent. We can do that, you know, if that bothers you, and he will be subject to penalties of perjury.

This is an unusual case because you haven't let Mr. Dunham or anyone else talk to him.

MR. LEONARD: I understand.

THE COURT: So the petition was filed on the request of his father. The only information that was developed was on the financial ability -- I did not grant the appointment of Mr. Dunham's office until I had some information as to his financial eligibility. When I received that information, I couldn't figure out any other way to determine that financial eligibility without bringing Mr. Hamdi here. I didn't want to

do that until the government had been served and had a right to respond.

Now, if you are concerned about that issue, I'm sure the Marshals can have him here this afternoon and we can make a financial inquiry.

MR. LEONARD: Well, Your Honor, my view would be that the elder Mr. Hamdi was obligated to provide the type of financial information. After all, apparently, Mr. Dunham has been retained on his behalf through this attorney in Qatar.

THE COURT: I don't think Mr. Dunham has been retained. He's been appointed by this court.

MR. LEONARD: All right. But he was asked to be involved by this attorney in Qatar, and the case law is clear that on issues of financial eligibility, the financial resources of the family can be considered. But again, Your Honor, I would just go back to this whole issue of access to counsel and everything else is tied up in the merits of this action, the merits of the habeas petition, and a simple 21-day request for an extension of time is not going to unduly prejudice either side in order to get those issues before the court and then the court's exercise of restraint then determine whether or not it's appropriate to proceed further.

THE COURT: Mr. Leonard, one thing that puzzles me in your request for the extension of time is that, first off, this person was brought here at all, brought into the United States

at all. Someone either with the military Department of Defense, Department of Justice made the decision to bring him here. That someone I cannot imagine was not advised by counsel as to the fact that this petition, or something similar to this, might crop up to have a supposed U.S. citizen in this country in a military brig not charged civilianly, not charged by the military, because it can't most likely, and I guess my concern is did whoever made this decision to bring him here, did they have ineffective assistance of counsel, to use a term of art in the habeas field, on the part of the government that they now today don't know why they have him here or do not wish to make an answer already? That puzzles me that you are not in a position to make an answer as to why he's here.

MR. LEONARD: Your Honor, it's not a matter of not having a reason why Mr. Hamdi was brought to the Norfolk Naval Base. It's a matter of being able to articulate an effective and a thorough response to the allegations that are raised in the habeas petition.

THE COURT: And your representation -- how long have you been involved in the case since I entered the petition order last week?

MR. LEONARD: Only since the end of last week, Your Honor.

THE COURT: All right. And answer this, if you can: Is it your understanding, based on your client's information

that's been supplied to you, that the essence of the answer to the petition will be that Mr. Hamdi was an enemy combatant?

MR. LEONARD: Yes, Your Honor.

THE COURT: Motion is granted. I'm going to allow the motion of the United States to respond to this petition. I believe it would be June 13th. Is that the 30 days?

MR. LEONARD: Yes, Your Honor.

THE COURT: All right. June 13th.

Mr. Dunham, I'm going to also order the United States to allow you to have access to Mr. Hamdi within the next five days, and I don't know if Mr. Hamdi speaks English? Do you need an interpreter; do you know?

MR. LEONARD: I do not know, and I would hope the United States would advise me. If they don't, I may have to go back with an interpreter and would ask the court to rule on that now so we don't have to come back to court over whether I can take an interpreter with me.

THE COURT: Do you know whether he speaks English, Mr. Leonard?

MR. LEONARD: No, Your Honor, I don't.

THE COURT: You didn't get that information from his father or the attorney in Qatar?

MR. DUNHAM: No, I didn't. I don't have that information at the present time. It's quite possible I will need an interpreter. I am dealing with an Arabic interpreter

in another case that I'm in, so I believe I can get somebody who's acceptable to the U.S. to go with me if I need an interpreter.

THE COURT: All right. June 13th will be the due date from the United States. Any response from the Public Defender will be the 21st of June, and then after that I will issue such order as may be appropriate.

Mr. Leonard, your position may be he's an enemy combatant, but since he is a U.S. citizen in the custody of the military, I'm concerned about Fourth Amendment and Fifth Amendment potential violations, and maybe there are none. Maybe this habeas petition will go away, I don't know, but Mr. Dunham at least needs to speak to his client. And if there are protective orders that you wish him to sign, I notice Mr. Dunham was just appointed as Public Defender a little over a year ago. He had his FBI clearance within the last year -- probably more recent than you've had an FBI background check done -- and he should be cleared. I don't know what he's cleared for, but that's an issue that needs to be of concern.

And I don't know if any other members of your staff have had a clearance. So Mr. Shelton and Mr. Kamens, I don't know the hiring practice, whether they have to go through a full field investigation and have a clearance, but at this point I'm only authorizing someone with at least a top secret clearance to talk to Mr. Hamdi. And also if there's an

interpreter involved, the same thing would have to apply to that person.

MR. DUNHAM: Your Honor, on the top secret issue, I believe my clearance at the present time is secret, but it s adequate for the Moussoui case, and I can't imagine there's anything in Mr. Hamdi's situation that's more sensitive than what I'm dealing with in that matter.

THE COURT: Well, I'll let you and the U.S. attorney worry about your clearance level instead of me. That's an executive branch decision anyway.

Mr. Leonard?

MR. LEONARD: Your Honor, is your order authorizing Mr. Dunham to have access in the context that he's allowed to have private consultation, or are members of the military to be present?

THE COURT: He's allowed to have private consultation. Otherwise, he cannot represent him in this matter.

Mr. Dunham, one thing I want you to get into is the fella's financial assets too. If you find he's getting a hundred thousand a year from the Saudi government someplace, or Qatar government, you are to report that to me immediately, or anything short of any income.

MR. DUNHAM: That is a concern of mine. I do not want to waste my office's resources if he's got money. So

that's one of the first matters I want to take up with him. The other thing, Your Honor, is on the movement. Did you decide that they could move him, or could you hold him here until this matter is concluded?

THE COURT: Since we have jurisdiction over the case, I'm not going to raise that issue unless there is a movement, then you can come back in. If he's shipped off to Diego Garcia, then that's one thing. Guantanamo Bay, Cuba, we have cases up here all the time, or historically one or two a year from Guantanamo Bay where a civilian has committed manslaughter or rape or whatever in Guantanamo. Norfolk happens to be the first stop for the MAT flights from Guantanamo, so we frequently have those types of cases and I'm sure we could make arrangements to put you on a MAT flight which is back down to Guantanamo. It may not be the most pleasant accommodations, but that's been done many times.

All right. Anything further? I'm going to enter a short order reciting just what I've said.

MR. LEONARD: Nothing further, Your Honor.

THE COURT: And I'm not sure you have a right to appeal this. Let me just mention that, either side. You may under Rule 71, but Judge Clarke some years ago said in habeas proceedings he wanted the whole lot put together when it came up on appeal, all the motions, and I'm not sure that flies in this type of case, but you may want to take a look at whether

Rule 72 and its procedures apply to this type of thing or whether you have to address it in the objections to the Report and Recommendation. But I will let you worry about that. It will just give you one more thing to think about.

Court's in recess.

(Whereupon, this hearing concluded at 11:30 a.m.

* * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

x Sharon B. Borden x

Sharon B. Borden

x May 21, 2002 x

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI and FRANK W. DUNHAM, JR., as next friend of YASER ESAM HAMDI,	)	
Petitioners,	)	CIVIL ACTION
v.	)	NO. 2:02cv348
DONALD RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia,	)	
Respondents.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

May 29, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR., ESQUIRE
LARRY W. SHELTON, ESQUIRE
GEREMY C. KAMENS, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Assistant United States Attorney

have an evidentiary hearing in this matter, but it appears he cannot. It is not a post-conviction situation as I understand it. And the statute is clear, and the decisions -- the Supreme Court decisions in Wingo v. Wedding, which is 418 U.S. 461, which is a 1974 case, and I assume it referred to Holiday v. Johnston, which was a 1941 case, as to the power of the Magistrate, it would appear that unless it's a post-conviction relief that's sought that the evidentiary hearing must be conducted by a District Judge.

To the extent that I have entered an order indicating that the Magistrate Judge would hold such hearings, I feel that by further reviewing the statute that the hearings will be held before a District Judge if there is an evidentiary hearing; however, other matters may be referred to the Magistrate Judge for determination. Under the new Magistrate statute, 28 United States Code Section 636(b)(1), it only allows a Magistrate Judge to hear those matters affecting those matters concerning post-conviction matters. As far as I can tell, there is no pre-conviction. That does not mean that they would not have the jurisdiction to make an initial determination and to issue show cause orders; however, in order to make the record clear, and to arrive at a fair and just solution in this matter, it would appear that the Government would have to show cause why this gentleman is being held. And the order to show cause, I will

grant it until June the 11th.

Mr. Hamdi has filed what appears to be a pro se petition for relief also, through someone else, but, as I understand it, he's being held incommunicado, and, as the Courts have said, we can't be too technical about allowing the petitions to be filed. There is no question that the petition shall be filed.

To the extent that there may be any problem concerning the fact that the petition is filed, I'm ordering it filed in the interest of justice. The interest as is said in the case of Story v. The Commonwealth of Massachusetts, a 1901 case in the Supreme Court, they stated the interest of both the public and the petitioner require promptness, that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible, that, if not, all having anything to do with his restraint be advised thereof and the mind of the public be put at rest. And, also, that a further action is to be taken in the matter it may be taken without delay.

It's clear there is no greater writ than that of the writ of habeas corpus nor can any person be held under our Constitution, be they alien or citizen, without due process of law under our Constitution.

So the question is why is this gentleman being held, and, if he's validly being held, then he may be held or

restrained. If the holding is not valid, then that may be a different situation. If he be an alien, the Constitution still applies to an alien. The individual is being held within the Eastern District of Virginia at the Norfolk Naval Station as I understand it.

I'll be glad to hear from you as to why an attorney cannot communicate with him, Mr. Leonard, or whomever desires to tell me why I can't issue such an order.

MR. LEONARD: Thank you, Your Honor. I would like to introduce to the Court Gregory Garre. He's with the Office of the Solicitor General of the Department of Justice. I have filed an application for his admission pro hac vice. He will be arguing on behalf of the respondents.

THE COURT: He is admitted. Let's proceed.

Why should this person be held incommunicado?

MR. GARRE: Thank you, Your Honor, for the opportunity to appear here.

The position of the respondents is that, first, of course, the Court lacks jurisdiction to enter any order in this case until it's determined that it has jurisdiction.

THE COURT: I just determined I have jurisdiction.

MR. GARRE: Okay.

THE COURT: Once that's determined, you may proceed from there. We all understand that this gentleman is being held. There is no question that he is incommunicado. He

can't speak with anyone. So consequently, how can anyone get to him, other than the fact that two petitions have been presented to this court for habeas corpus? Accordingly, this court, as the Supreme Court has said on several occasions, technical niceties are not to be such as to hinder a person from applying for a writ.

MR. GARRE: Yes, Your Honor. If I could make three points in response to that, hopefully it will clarify the situation.

THE COURT: All right.

MR. GARRE: First, a minor factual point. Mr. Hamdi does have access to the mail and can send letters out, so he's not being held incommunicado to that extent.

Secondly -- and this is another factual point which I think is significant. As the other detainee --

THE COURT: Have we got an affidavit to that effect?

MR. GARRE: I don't here, Your Honor.

THE COURT: I said do we have an affidavit to the effect that he's not being held incommunicado?

MR. GARRE: I'm sorry, Your Honor. We have not presented an affidavit. I think all of these issues we intend to address in response to the Court's show cause order.

THE COURT: The show cause order will be answered

on June the 13th.

MR. GARRE: Yes, Your Honor.

THE COURT: I want to make something else clear. On June the 13th, by 12:00 noon, so that we don't have any question about filing it at 5 o'clock in the afternoon.

MR. GARRE: Another minor factual point. It's just a point of the litigation that's going on in the District of Columbia where detainees held in the same situation or similar situations as Mr. Hamdi have had next friends since brought by direct family members. In this case, of course, we know the father has been in contact with the Public Defender, so the father would be the natural next friend in the typical situation. And there is no apparent reason that's been presented, in the papers at least, why he's not in a position to act as best next friend. And we also think for the reasons we set out, and I won't get back into them if Your Honor doesn't want to hear them today, that Mr. -- that the Public Defender in this case lacks authority to proceed as the next friend. So particularly where there is a next friend, there seems to be a parent, and, for all we know, available to play that role, we would urge the Court not to allow the case to proceed in the usual situation, in fact the unprecedented situation where the Public Defender is being appointed to act as the next friend to somebody that he has no relationship at all.

Now, if I could go back to the access to counsel issue, that issue is wrapped up inextricably with the question of whether or not the detainee, Mr. Hamdi, is being lawfully detained. As we intend to show in response to Your Honor's order, under the Laws and Customs of Wars enemy combatants, like Mr. Hamdi -- and we again intend to show that in our petition -- are entitled to be held --

THE COURT: Is he a combatant? Was he a combatant?

MR. GARRE: The United States military has determined that he is an enemy combatant. And we will fully address that in our show cause order, Your Honor. That issue is -- and we'll explain this in our response. That issue is tied directly --

THE COURT: That would go to the heart of the habeas matter itself, would it not?

MR. GARRE: It does, Your Honor. And importantly --

THE COURT: So that an evidentiary hearing would have to be necessary, not just I want to present a petition and say he's a combatant; is that correct?

MR. GARRE: Well, first of all, there would be the question of what factual issues are relevant to the determination whether he is an enemy combatant.

THE COURT: Was he a combatant? So is that a

factual issue?

MR. GARRE: That is a factual issue to the extent we maintain he is an enemy combatant. Significantly, the petition that's before this court now does not assert otherwise. So there is -- to the extent that it's a fact before the Court, it's not a disputed fact in the pleadings here. We do intend to address in our papers the question of Mr. Hamdi's status as an enemy combatant and the related question of to what extent the Court can inquire into that, what facts are necessary to make that determination, and if any evidentiary determination is necessary at all. Those issues are --

THE COURT: So the Court doesn't have the power to determine if he's a combatant or not? Is that what you're saying?

MR. GARRE: No, Your Honor.

THE COURT: You mean the United States -- let's say they picked up John Doe off the street. You can pick him up, throw him in the Navy Brig, and say he's a combatant, and the Court can't have any jurisdiction? Is that your position?

MR. GARRE: That's not the position of the United States.

THE COURT: Obviously it wouldn't be.

MR. GARRE: The United States is fully prepared to justify, to explain, the reasons why it's detaining Mr. Hamdi

as an enemy combatant in a properly filed habeas petition where those issues are before the Court.

In response to the Court's --

THE COURT: So you maintain it's not a properly filed petition? I'm going to make this clear, it's a properly filed petition. Now we go on from there.

MR. GARRE: The United States is prepared to respond -- the respondents are prepared to respond fully to the show cause order to explain why the military is lawfully holding Mr. Hamdi as an enemy combatant. We're not dealing with an individual who was picked up off the streets. We're dealing with an individual who the military has determined was seized in Afghanistan in an area of ongoing conflict as to --

THE COURT: Why did the Navy choose to treat him differently than the other detainees, where the other detainees are not on American soil, whereas this particular detainee supposedly is on American soil and is in this particular jurisdiction? The rest of them are not in the jurisdiction of any court that I know of, in the United States.

MR. GARRE: Well, certainly our position is that the military when it seizes enemy combatants has the authority and the discretion to determine where to hold those enemy combatants whether they're on American soil or in a

foreign land like the other detainees. That's a matter that's purely up to the military. It's not a --

THE COURT: So you contend he's a prisoner of war; is that correct?

MR. GARRE: No, Your Honor. Our position is he's an enemy combatant or an unlawful combatant, which is distinct.

THE COURT: What is an enemy combatant?

MR. GARRE: Again, Your Honor, I want to be able to answer your question without getting too deeply into the merits of the issues that are going to be the heart of the matter that's briefed before the Court.

THE COURT: My only problem with that is, as far as I know, there has been no declaration of war, has there?

MR. GARRE: Your Honor, there hasn't been a formal declaration of war.

THE COURT: There have been a lot of people who say we have a war, but I don't know if this is really a war or what is it.

MR. GARRE: Well, certainly our position is that the individual in this case was detained as an enemy combatant in connection with armed conflict and ongoing activities which have been characterized as a war effort as well as armed conflict, and that that determination, the authority of the military to seize people as enemy combatants

and hold them, is in no way dependent on a Congressional declaration or formal declaration of war.

THE COURT: If the Army then were to, let's say, go into parts of Virginia to root out criminals and someone opposed them, would they still have to be brought before a court or could the Army take care of those people and just throw them in the Brig?

MR. GARRE: Well, to be clear, again, Your Honor, the United States, although it objects to the particular filing in this case, we don't object to the notion that these individuals -- Mr. Hamdi can bring a proper habeas petition to challenge his custody. Now, the situation that Your Honor -- the hypothetical posed is quite different.

THE COURT: First, let me say this: The statute says that you have five days in order to answer. It can be extended until a maximum of 20 days. It can be extended. Do you not want it extended?

MR. GARRE: We're prepared to show --

THE COURT: Do you want to show cause in five days rather than June the 13th?

MR. GARRE: No, Your Honor. We appreciate the schedule that Your Honor has mapped out, and we're going to present --

THE COURT: I only patterned it after that which the Magistrate had patterned it, which would have been June

13th anyhow.

MR. GARRE: Right. We're prepared to show cause on that date. I think it's significant to note, we've noted this in our papers thus far, which haven't dealt with the merits at length, that we're not dealing with a novel doctrine here, the notion of holding enemy combatants. It's a doctrine that is recognized in the Laws and Customs of War. It's a doctrine that's been recognized --

THE COURT: There isn't any question it's recognized in the Customs of War, but I didn't know we had a war.

MR. GARRE: Well, Your Honor, we would address that in the papers, the extent to which the doctrine is applicable here. I don't know that the Public Defender, the attorney representing Mr. Hamdi or his next friend, has opposed the application the enemy combatant doctrine on that basis. He may well do so. We would be prepared to address that.

THE COURT: The question isn't what they have addressed. The question is whether he's legally being detained. That is the question. Whether they address the issue or don't address the issue, the issue still is is the gentleman being legally detained. And what causes it is the United States itself has said this particular gentleman we're treating in a different way than all the other detainees.

MR. GARRE: Well, Your Honor, he may be in a

different location, but he's not being treated in a different way. He's being held by the United States. The United States is involved in intelligence gathering efforts with respect to detainees, which are related directly to the ongoing conflict in Afghanistan as well as the broader effort the United States has undertaken in Operation Enduring Freedom. In that respect the detainee in this case is not in a different position than the other detainees. He's being held as an enemy combatant.

We agree with you the issue is whether or not he's being legally detained. And we will be prepared to show on June 13th fully addressing the merits of the doctrine which permits the military to hold an individual who's an enemy combatant, addressing why the individual in this case is properly regarded as a enemy combatant, and why this court can rule on that basis that he's lawfully detained.

The issue of whether or not he should be permitted access to counsel in advance of that is directly tied to the question of whether or not he's being lawfully detained. Our position is --

THE COURT: Let me ask you this question then: Assuming that he were an enemy combatant, then he would not be entitled to counsel; is that correct?

MR. GARRE: That's our position. He wouldn't be entitled to the type of counsel --

THE COURT: Is there a particular type of counsel that he's entitled to?

MR. GARRE: No, Your Honor. He would not --

THE COURT: He's not entitled to any counsel?

MR. GARRE: He would not be entitled to counsel to represent him challenging his confinement. And, again, that's important because of the reasons for which unlawful combatants or enemy combatants are held by the military, which is directly tied to the ongoing hostilities in connection which they were captured and seized.

The current situation where the Court leaves its stay order, its stay order in effect with respect to the Magistrate's access order or simply vacates that order, as we urge you to do, leaves the status quo in effect providing -- permitting access to counsel before any determination has been made, and even the issues have been fully briefed with respect to whether Mr. Hamdi is being lawfully detained, will dramatically disrupt the status quo, and we would submit could result in irreparable harm. The military intelligence gathering efforts are very important, dependent upon establishing a relationship of trust and dependence between the detainee and the questioners, and inserting a counsel between the detainee and the military authorities would directly disrupt that relationship, if not irreparably harm it. That's the customary situation where counsel are

inserted into that relationship. That is allowed under the enemy combatant doctrine in connection with those that have been seized and captured in connection with armed hostilities.

We urge the Court to provide the Government and the parties to fully address the question of whether Mr. Hamdi is being lawfully detained before the Court takes the unprecedented step of ordering access to counsel without having any determination of whether he's been lawfully detained. We think the expedited schedule would --

THE COURT: What you're saying is that, if I understand correctly, that an individual being detained by the military is not entitled to counsel, period; is that correct?

MR. GARRE: With this caveat, Your Honor: If he's --

THE COURT: What caveat?

MR. GARRE: If he's being lawfully detained.

THE COURT: If he's being lawfully detained? Let's assume it's a service personnel that's being detained. Is he entitled to counsel? I mean, now he's committed some crime. Is he entitled to counsel?

MR. GARRE: Your Honor, again, in this case we're dealing with enemy combatants.

THE COURT: Just answer it yes or no. Can you

answer it yes or no? Is a service person entitled to counsel who commits a crime?

MR. GARRE: Under the procedures in place, yes, and he's not being held as an enemy combatant, Your Honor.

THE COURT: All right. So if the person is an enemy combatant and he commits a crime, he's not entitled to counsel?

MR. GARRE: That's the position which --

THE COURT: So he could kill somebody, and you could try him and shoot him, and he still wouldn't be entitled to counsel?

MR. GARRE: I'm not sure I follow that hypothetical.

THE COURT: The hypothetical is this: Here is an enemy combatant. Okay. He shoots somebody at the Naval Base. Okay. Then you just -- they just say, okay, we're going to put him to death, he's not entitled to counsel; is that correct? He's an enemy combatant you said. He shot somebody. Now you can just go shoot him, can't you?

MR. GARRE: Our position is that he's being lawfully detained as an enemy combatant, and as part of that detention he's not entitled to access to counsel.

THE COURT: So he's not entitled to counsel no matter what he does?

I reduce it to an absurdity in order to find out

just what the position of the Government really is. Is it the position of the Government that under no circumstances an enemy combatant is entitled to counsel?

MR. GARRE: While he's being held as an enemy combatant in connection with the ongoing hostilities, yes. And we ask the Court for an opportunity --

THE COURT: When are these hostilities going to end? Is he going to be held forever? Can he be held for life?

MR. GARRE: We don't know when they're going to end. What we do know, Your Honor, is they're active and ongoing today. I don't think anyone disputes that or at least has disputed thus far. This situation is not different from the situation in which enemy combatants have been held before during time of hostilities. At some point there may be a question --

THE COURT: Give me an example.

MR. GARRE: Well, certainly one of the cases we cited in our footnote in a brief, the In re Territo case out of the Ninth Circuit, involved the holding of an American citizen as an enemy combatant in connection with World War II.

THE COURT: No question. That was a declaration of war, wasn't it?

MR. GARRE: There was a formal declaration in that

case. But, Your Honor, we would submit that that -- the application of that doctrine, which is a doctrine which arises not out of the way in which formal war is declared under the Constitution but, instead, under the Customs and Usages of War.

THE COURT: What's bothering me is that Congress has decided whether there is a war or not generally. Isn't that what the Constitution provides?

MR. GARRE: That's what the Constitution states with respect to formal war. Now --

THE COURT: You have informal -- we have informal war; is that it?

MR. GARRE: Certainly there have been numerous occasions --

THE COURT: So we have informal combatants; is that correct?

MR. GARRE: We have enemy combatants.

THE COURT: This is an informal enemy combatant?

MR. GARRE: No, Your Honor.

THE COURT: He'd be a formal combatant if a war was declared; is that correct?

MR. GARRE: That's certainly not our position, Your Honor. What we have here, our position is we have a full-fledged enemy combatant who was involved in hostilities ongoing today. We don't think the presence of a formally

declared war is necessary to --

THE COURT: Let me ask you, let's assume this particular person, I don't know what -- he happens to be Saudi Arabian, but let's assume he was an Afghanistan. Could you just pick up somebody off the streets of Afghanistan and say they're enemy combatants?

MR. GARRE: We could make that -- if that happened --

THE COURT: That determination is made by the military, and there is nobody that can change that determination?

MR. GARRE: No. We are prepared to show this court that Mr. Hamdi is an enemy combatant and to inform this court the considerations that are relevant to that determination, and that is part of --

THE COURT: So he was captured during a war engagement with the United States?

MR. GARRE: That's correct, Your Honor. And we're prepared to make that showing on June 13th and show why Mr. Hamdi is being unlawfully detained. And we urge the Court --

THE COURT: I'm not having an evidentiary hearing on the 13th. On the 20th at 2:00 p.m.

MR. GARRE: We think -- and we will explain this more in our papers, Your Honor -- it may not be necessary for the Court to undertake an evidentiary hearing. As I stated,

thus far the allegations in the petition don't contain an allegation that Mr. Hamdi is not an enemy combatant, so just on the papers that allegation doesn't exist. Now, if the Public Defender amends his petition, then that allegation would exist, but even then there would be the question of what the United States has to show to establish an enemy combatant status. That's something we intend to address in our papers. And we urge the Court before getting into questions of relief, questions which require the Court to find in essence that Mr. Hamdi is being unlawfully detained, that permits the Government to make that showing.

THE COURT: Did you -- in the Vietnam War did you -- were there any prisoners kept in the United States?

MR. GARRE: I believe that there were, Your Honor. I can't be accurate in my factual submission. That's my understanding. That's certainly something we could address in our show cause order. We don't think, to be clear, that the application of the doctrine is dependent on the presence of a formally declared war. Congress may not have formally declared a war. Of course, it has passed a law authorizing the use of military force. But to be clear, there have been numerous situations in our history where the United States has been involved in armed conflict in the absence of a formally or Congressionally declared war. And we think that the presence of a formal declaration is not required to the

application of the doctrine under which the United States is --

THE COURT: Let's go to the airports where we have military personnel now guarding the airports. I assume if the military personnel engaged in an altercation with an individual they could take that individual into custody and he would not be entitled to a writ of habeas corpus; is that correct? It would be a conflict. He would be a combatant. Is that correct? We're talking about a person going to catch an airplane. Maybe a buddy of yours might even ride the airplane, get angry with whomever the soldier was who was there. I see them there at the airports, don't you?

MR. GARRE: I certainly don't believe that would be correct, Your Honor.

THE COURT: But that's a combatant, isn't it?

MR. GARRE: No. Not in the way that the term is used under the existing doctrine.

THE COURT: So that it makes a difference as to what? What changes a person into a combatant who is an enemy?

MR. GARRE: Well, Your Honor, again, this is something we will explain in-depth in our show cause papers, and that has only been flagged briefly today. Certainly under the definition the Supreme Court relied upon in the Quirin case, and it's discussed in the In re Territo case,

the Ninth Circuit case cited in our papers, involves the taking up of arms or other belligerency against the United States. The respondents here are prepared to make that showing with Mr. Hamdi.

If I could just make clear another issue with respect to access to counsel. On one of the Court's hypotheticals it posed the situation where a detainee were actually charged with a crime. We don't dispute that if a detainee were charged with a crime then other rights might come into play which would entitle him to counsel. And that -- a similar situation arises in Mr. Walker Lindh who's being held in the Eastern District of Virginia who was provided with counsel after he was charged with crimes. So if and when a determination were made to charge Mr. Hamdi with a --

THE COURT: If you charge him with a crime, if somebody were to take a warrant out against Mr. Hamdi for any reason whatsoever, then it's your position that he could have counsel; is that correct?

MR. GARRE: That's the position. And that's what will happen --

THE COURT: What will make a difference?

MR. GARRE: There is a fundamental difference between individuals who are prosecuted through the civilian courts for --

THE COURT: Would he be less of an enemy combatant?

MR. GARRE: The United States, the President acting as Commander in Chief of the military, can make a determination from a number of different --

THE COURT: The President is the person that makes the decision here?

MR. GARRE: The military is making the determination. The President, of course, is ultimately, of course, the Commander in Chief. The military can make a determination from a number of different options and ways to hold enemy combatants, whether ultimately they should be charged with war crimes. The President has issued a military order which would provide for the designation of individuals who could be treated subject to that order.

Currently that order is not applicable to Mr. Hamdi, but it could be. It could be charged with civilian crimes. It could be repatriated. Currently we're dealing with individuals who have been detained in armed conflict, which is active and ongoing, and are being held as enemy combatants. And again I'm sorry to repeat myself, but we will be prepared to show why that detention is lawful, and why that detention is lawful without access to --

THE COURT: The only thing that creates a problem in this case is the fact that the United States chose to

treat Mr. Hamdi differently than the other detainees, which creates something of a differentiation between it and how it treats the other detainees.

MR. GARRE: Your Honor, I think the only --

THE COURT: Are the other detainees held in a similar type facility?

MR. GARRE: The other detainees are being held in a military facility. Now, it's off American soil, but that --

THE COURT: I understand that. Is it a similar type facility or is it -- is he being held in a prison-type facility or a jail or is he being held in a compound like the other detainees are being held?

MR. GARRE: Well, all the detainees that are relevant here are being confined, and they're --

THE COURT: I understand they're confined. I've asked you a particular question. Is this detainee confined in the same manner as the detainees in Guantanamo?

MR. GARRE: This detainee is confined in the Naval Brig here.

THE COURT: Naval Brig?

MR. GARRE: Yes.

THE COURT: My recollection is it has bars and cells; is that correct?

MR. GARRE: That's correct. And that's also true of the detainees who are being housed in Guantanamo.

THE COURT: They're not contained in sort of a camp then, like prisoners of war usually are detained?

MR. GARRE: These detainees are confined behind bars in a similar manner as Mr. Hamdi. And certainly our position is there is no distinction --

THE COURT: No distinction in the manner in which the confinement between Hamdi and the people in Guantanamo, and that's your position?

MR. GARRE: No distinction. Certainly no distinction that's relevant to the determination of whether or not Mr. Hamdi is being lawfully --

THE COURT: I'll decide what is relevant. I didn't ask you what was relevant. Understand my questions. So either you answer them directly or else we're dealing with different things. We're either dealing with apples or we're dealing with oranges. I want to deal with the same things you're dealing with. Now, my question is very frank. Is there a Brig on Guantanamo?

MR. GARRE: They're not being held in the Naval Brig on Guantanamo. They're being held in prison-like conditions, a similar --

THE COURT: They're being held in what would normally be termed a prisoner of war camp; is that correct?

MR. GARRE: I don't know that that is correct, Your Honor.

THE COURT: They're not being held -- they're being held differently than in a prisoner of war camp; is that correct?

MR. GARRE: I don't have personal familiarity with prisoner of war camps. What I do know is that the Guantanamo detainees are being held in cells. They are individually detained, and in that sense are being held in like manner as Mr. Hamdi.

THE COURT: So they are -- they're not in an area where they have access to one another; is that correct?

MR. GARRE: They're being held in a rudimentary cell block. I think there are varying degrees of access. They are being held in individual cells, though.

THE COURT: Do they have access to one another?

MR. GARRE: I believe that they have limited access to one another, although that certainly is --

THE COURT: Who does Mr. Hamdi have access to, besides the people who are holding him? Anyone?

MR. GARRE: Yes, Your Honor.

THE COURT: Who?

MR. GARRE: Mr. Hamdi has access to government officials. He has access to the International Committee for the Red Cross. And he has limited mail privileges.

THE COURT: So the International Committee for the Red Cross. And who was that person who has had access to

him? Have you got a name?

MR. GARRE: I don't have a name. My understanding is that he has met with an individual from the ICRC, the International Committee for the Red Cross. And we can try to obtain that name.

THE COURT: Furnish that name to the Court, please, and the date when that person had access to him.

MR. GARRE: We'll get that information, Your Honor.

THE COURT: All right. And furnish it before June the 13th, as promptly as possible.

Let's go ahead from there.

MR. GARRE: Thank you, Your Honor.

THE COURT: So what you're saying is that since he is a combatant, no matter who or what he may be, then he can be held incommunicado; is that correct, other than somebody from the International Red Cross can come to see him occasionally? Does he get packages from the International Red Cross?

MR. GARRE: He -- I don't believe he has received packages from the International Red Cross. I can try to verify that.

THE COURT: How about packages from home?

MR. GARRE: I don't believe he's received packages. But that is our position, Your Honor. And even more fundamentally --

THE COURT: Even in wartime the Red Cross used to give packages to prisoners of war.

MR. GARRE: That is our position. And even more fundamentally we ask the Court for an opportunity to explain to the Court in-depth why that is true. Certainly these are extraordinarily important issues that have very important critical national security concerns. And we're asking the Court for an opportunity to explore those. The papers that are before the Court are addressed to the jurisdictional issues.

THE COURT: I've already settled the jurisdictional issue. He's out there. He's being held. And he's asked for his constitutional right to determine why he's being held. And I'm going to make the Government explain why he's being held. And so far the only explanation I have is that he was an enemy combatant and that as an enemy combatant he's not entitled to counsel, he's not entitled to anything except a determination as to whether or not he's an enemy combatant. But on that issue he has no right to have a counsel according to the Government; is that correct?

MR. GARRE: The Government would like an opportunity to make that showing fully briefed with any necessary additional support.

THE COURT: You think that's fair and just? The United States feels that under its Constitution it's fair and

just that a person may be typed an enemy combatant no matter who or what they are, whether they are a citizen of the United States or somewhere else, and as such he's not entitled to counsel; is that correct?

MR. GARRE: That, Your Honor -- our position is that they may be held consistent with the Laws and Customs of War which courts have recognized.

THE COURT: Every time I raise one of these absurdities, and I raise them because they are absurd and nobody would ever believe that that could be the case, but, if your position is correct, that absurdity would be the case. Think about it a minute.

MR. GARRE: Your Honor, it wouldn't be because we are prepared to explain why this person is being held as an enemy combatant.

THE COURT: Is not entitled to counsel. Whether he's a combatant or non-combatant, I want to know why he is not entitled to counsel.

MR. GARRE: Well, again, that goes to the doctrine which we believe entitles the military to hold people without access to counsel. I mean, we're talking about people who have been captured in connection with hostilities. Now --

THE COURT: Do you have any case in which a person was held without the right of counsel?

MR. GARRE: We have cases which we've cited, and

again we'll provide the Court with more support. We would refer the Court to the Territo case and the Quirin case. Those cases weren't addressed to the threshold issue that is now before the Court of whether or not they could be held without access to counsel before any determination had been made as to whether or not they were properly regarded as enemy combatants and any determination had been made as to whether or not they be held as enemy combatants. If I could --

THE COURT: It just seems to run counter to the very basic right of counsel that is part of our Constitution, isn't it?

MR. GARRE: Certainly if this were a situation where someone had been charged with a civil crime and were going to be prosecuted for civil offenses, then constitutional rights, with which the Court is well familiar, would be directly --

THE COURT: If he were facing, let's say, a sentence of up to one year imprisonment, he would be entitled to counsel; is that correct?

MR. GARRE: If he were going to be tried in the civilian courts, yes, that is correct, Your Honor. We're dealing with --

THE COURT: Even in a military court. Let's take a military court. If he were going to be sentenced up to a

year imprisonment, would he be entitled to counsel?

MR. GARRE: Under the President's military order, if he were being subject to that order he would be provided with counsel.

THE COURT: He would have counsel?

MR. GARRE: Again, we're dealing with individuals who are in a different category, Your Honor, who are captured as enemy combatants. Certainly it would be anomalous for the Court to conclude that someone that has been captured on a field of battle would be entitled to counsel while being held by military authorities. Our position is this situation --

THE COURT: Normally that wouldn't be the case. The United States has chosen to have this particular individual treated differently from all the other detainees.

MR. GARRE: Only insofar as where he is located, not insofar as any other matter which is pertinent to the way he's being detained.

THE COURT: Well, he certainly doesn't have access to any other detainee, does he?

MR. GARRE: There is no other detainee being held at the Naval Brig. But that's not -- the access of other detainees is not a challenge that detainees have made. To the extent detainees -- the detainee here or detainees elsewhere are challenging their confinement, it's the same legal issue with respect to the authority of the United

States or the military to hold them.

THE COURT: Why would it be the same? I don't have any jurisdiction over Guantanamo. Neither does any other court, that I know of, have any jurisdiction of Guantanamo. When a crime has been committed in Guantanamo, it's wherever they fly into the United States. That particular place of location is the -- where the particular matter would be heard.

MR. GARRE: That's correct, Your Honor, but the cases like In re Territo and the Ex parte Quirin dealt with situations where the courts did determine they had jurisdiction to determine whether or not someone was being lawfully held as enemy combatants. So to that extent this case is no different.

The jurisdictional arguments that are being made with respect to detainees in Guantanamo don't apply here, but the other cases which we've cited and which we intend to explain and flesh out in our papers address the merits of why he's being lawfully detained do deal with similar situations.

THE COURT: The whole thing that's bothering me is the right of access to counsel. You may be perfectly justified in detaining this individual, and it may even be the best thing under the circumstances; however, the question really is I'm concerned that he should be held, in essence that the only person that can speak to him outside of those

persons who are his captors are the International Red Cross representative who paid him a visit, I assume, some -- one time or other.

MR. GARRE: I --

THE COURT: How long has he been held?

MR. GARRE: I don't have the exact date. I know the petition in this case, the Government received notice of that a couple weeks ago. I believe he has been held some time since the fall. I don't have the exact date. That's something we could address in our response.

Important for the Court to consider are the national security issues which come into play with respect to not only --

THE COURT: They may indeed override that. And that's an interesting point. What you're saying is national security interest in essence -- Congress certainly in times of grave danger under the Constitution have the right to suspend the writ of habeas corpus. Have they done it?

MR. GARRE: I believe there may have been a challenge of whether or not President Lincoln did it during the Civil War, but I don't believe that Congress has done it. We're not involved in that situation here.

THE COURT: The writ of habeas corpus still exists?

MR. GARRE: It does, Your Honor. That's why we're

prepared to show --

THE COURT: If it exists, then why shouldn't it exist for this individual unless Congress has done something concerning it?

MR. GARRE: To the extent the Court has determined it has jurisdiction to proceed, so we are prepared to respond to the writ of habeas -- the petition of habeas corpus.

THE COURT: I'm not granting any writ. I'm merely issuing a show cause order. Make that abundantly clear.

MR. GARRE: We're not maintaining -- this court has found jurisdiction. To the extent it's found that we're not maintaining, we don't have to respond to this. We're responding to the habeas petition and prepared to explain fully why he's being lawfully detained. We think deciding the counsel issue first would put the cart before the horse, and it would do so in a way that would gravely implicate national security interests. Inserting the lawyer between the detainee and the military could disrupt important intelligence gathering efforts that have been underway. And before the Court takes what would be in this case an unprecedented step, we ask the Court to give the Government an opportunity to fully brief, the parties an opportunity to fully brief, why this individual is being lawfully detained as an enemy combatant.

THE COURT: All right. I think I understand your

position.

Let me hear from Mr. Dunham.

MR. GARRE: Thank you, Your Honor.

THE COURT: All right, Mr. Dunham. Why should you be entitled to talk to this man who's being detained out at the Naval Base? They say he's a prisoner of war.

MR. DUNHAM: Well, let me go back to the question that I think hangs over this entire proceeding is why is Mr. Hamdi here in Norfolk instead of down in Guantanamo.

THE COURT: I'm trying to figure that out too, Mr. Dunham. I wish he were back in Guantanamo, and I wouldn't have the problem. But we've got the problem. Go ahead.

MR. DUNHAM: It's my problem too, Your Honor. And I -- you know, I think it goes back to the Executive orders that President Bush entered in connection with the so-called war on terrorism in which he singled out American citizens and said they were not subject to the Executive order. And Mr. Hamdi happens to be an American citizen, and so he can't be tried in the military tribunal, and he can't be rounded up the way other people may be able to be rounded up in connection with this matter.

And we -- he's not the only one that's been singled out like this. There is a case in this court up in the Alexandria Division, John Walker Lindh, who was apprehended on the battlefield, and has been charged, and has counsel.

THE COURT: He's entitled to counsel because they're charging him with some crime.

MR. DUNHAM: They charged him with some crime.

THE COURT: They don't charge this fellow with a crime, they can hold him incommunicado is what they're saying.

MR. DUNHAM: Indefinitely according to them, for life, as long as they're chasing al Qaida around the earth, they can hold this guy forever under their theory and he will never see counsel.

THE COURT: Well, Mr. Dunham, why is he entitled to your services? That's a horse of a different color.

MR. DUNHAM: Let me make one more small point, Your Honor, and then I'll answer your question very directly.

THE COURT: All right.

MR. DUNHAM: I asked the U. S. Attorney if he would promise that this man would not be prosecuted civilly, charged with a crime, and I got no assurance that he would not be. Now, so here we have a situation where I asked him, you know, it would affect my view of this thing greatly if you told me you were not going to prosecute him and --

THE COURT: What difference does that make? If they're going to prosecute him, if they even said they might prosecute him, if they said they might prosecute him, he would be entitled to a hearing.

MR. DUNHAM: That's correct, because he's being held and because he's being --

THE COURT: He would be entitled to counsel.

MR. DUNHAM: He's being interrogated, Your Honor. One of the big debates in the John Walker Lindh case up in Alexandria was the interrogation that went on by the military before they charged him. And during that period of time, their argument was he's not entitled to counsel because the military is holding him. Now, in that very case they want to use the statements that he made to the military against him in the prosecution.

Now, any good lawyer worth his salt if his lawyer was down at the jailhouse and they gave him the Miranda warning and he said I wanted my lawyer; well, the lawyer is going to go down there and talk to the man, and he's going to give him advice as to how to handle the interrogation. That is the overarching problem we have here.

The specific question Your Honor asked is why is he entitled to my assistance. Well, he's entitled to my assistance because the Court has determined in the interest of justice that a 2241 petition was filed, and 18 U.S.C. 3006(a) --

THE COURT: Don't forget there were two petitions filed, one by his next friend and one in evidently pro se.

MR. DUNHAM: I was unaware of the pro se petition.

THE COURT: Well, it's there.

MR. DUNHAM: Well, there is two filed. Why is he entitled to -- he's only entitled to my services because we've presented evidence to the Court of his indigency, that 18 U.S.C. 3006(a)(2)(b) permits the Court in its discretion in the interest of justice to appoint counsel to a 2241 petitioner who is indigent.

Now, my view is you just might as well write 18 U.S.C. 3006(a) out of the law. That's the statute that authorizes the Court to appoint counsel. If you're going to say, well, we're going to appoint you but you can't talk to your client, I mean, that is as absurd as some of the positions you advanced to Government counsel as, oh, yeah, we've got the authority to appoint you but we haven't got the authority to tell you you can go see this gentleman.

Now, the Government continually argues during the course of its presentation, Your Honor, we're going to show you, we're going to demonstrate to you, he's an unlawful combatant. Well, I think there is frequently two sides to a story. He may take the position, no, no, I was standing there tending to my camel when a bunch of guys came and rounded me up and said you're arrested, you're in the custody of the U. S. military.

I think he's entitled to any hearing that this court has to present his side of this thing. And it may

not -- it may differ from the military. I'm sorry, but they're not the arbiters of truth. The Court has to determine what's true. I don't know how the Court makes such a determination if it doesn't hear Mr. Hamdi's side of this thing. And I don't know how it hears Mr. Hamdi's side of this thing if he can't communicate with his lawyer who's going to present the case for him.

So from that standpoint it just seems to me that the argument, I know it's inconvenient for the Government, I know that they don't like to have inconvenient precedents set, but it just seems to me inherent in the Court's power to appoint me is the Court's power to say, and, Mr. Dunham, I want you to talk to this man and I want you to get his side of this thing so that when we have the hearing on June 20th we don't have to just listen to some affidavits from the Government about how he is a combatant, formal or informal, lawful or unlawful, and, hey, there is no evidence to dispute this because now can there be if I can't talk to this gentleman.

Now, they make the point that, well, the International Red Cross saw him, could have written, but this man speaks mostly Arabic, broken English. I understand I will be able to communicate with him in a very, very fundamental level. The Magistrate had ordered if I had a problem communicating with him I could take an interpreter

with me to help me. I would ask the Court to allow me to do that so we can have a full development of the facts and not just a one-sided hearing. I can't imagine what harm there is to the Government in letting the man talk to a lawyer. I haven't heard a cogent explanation of it other than that somehow the lawyer going in there will interfere with an interrogation, which, if I'm correct, has been going on now for nine months, because they say they picked him up last fall. He's been in Norfolk since April the 6th. He was brought here only, I'm convinced, because he's an American citizen and because they recognize that the Executive orders issued by the President don't cover him. And I believe that he -- that they either have got to charge him or set him free. That's our position. But in the meantime I want to find out.

THE COURT: They don't necessarily have to set him free. They have to return him to his country.

MR. DUNHAM: His country is the United States. He's a U. S. citizen. And --

THE COURT: Now, just because he's born here doesn't mean he's a U. S. citizen.

MR. DUNHAM: Unless he's renounced it.

THE COURT: He has a right to elect at a certain time. I think it's above 18, isn't it? Am I incorrect?

MR. DUNHAM: My --

THE COURT: He can elect to be a Saudi citizen if he's a Saudi Arabian he can elect to be a United States citizen, can't he?

MR. DUNHAM: My information is that he has made no election, from his family. From talking to his family, he's made no election. In the absence of an election, it would seem to me his place of birth would control. But setting all that aside, because the cases we've looked at don't seem to distinguish between whether you are a citizen or non-citizen, they turn largely on, first off, if you're on U. S. soil. Now, when you read Ex parte Quirin, the case referred to by counsel, it gets all the way up to the Supreme Court. And there are stipulations of complicated fact in that case, and there is counsel. There is no way in my judgment that -- there is nothing in that case to suggest that counsel in In re Quirin could not talk to the German saboteurs that came ashore here in the '40s to do bad things. It's clear they had counsel, that they were well-represented, that the facts in the case were developed. They couldn't have been developed any other way than counsel having access to them. There you have a formally declared war, saboteurs coming into the country off of a submarine. I mean, it just boggles my mind that the Government here takes the position that counsel can't see this man.

And I think, Your Honor -- I don't think there were

any problems with the way the petition was filed as next friend, but I think Your Honor, by the action you have taken has eliminated all those technical niceties.

THE COURT: What I have done is I've combined the pro se petition with the petition you filed, and therefore whatever it is we have two petitions pending, and, consequently, in both petitions I'm ordering that the United States answer or show cause by a written reply on or before June 13th at 12:00 noon. Now, we've settled that point.

The question not settled is the question of whether or not I have the right to appoint counsel or whether the Court has the right to appoint counsel for the individual who is facing continued incarceration.

MR. DUNHAM: I think the presumption has to be that the Court does because the statute authorizes the Court to appoint counsel. The Government has not shown the Court any case in which it said that when there was a proper habeas corpus petition filed in the Court that the petitioner could not have access to counsel. There is no such case that so holds. And the presumption against an incommunicado holdant, which is a constitutional anathema, the idea we have somebody here in Norfolk that's being held by the U. S. Government, that has no charges pending against him, that it cannot have counsel, is so mind-boggling it would seem to me the Government should be able to present some pretty clear case

law saying that he can't have access to counsel. The -- because all of the cases that deal with this. I mean, Ex parte Milligan, Yamashita, Quirin, they all obviously had counsel. There is not a mention of any of those cases that, oh, yeah, but you can't talk to your client, which, to me, is a fundamental -- if he can have counsel, then counsel -- access to counsel is inherent in all of that, you might as well not have counsel.

I could go over there, Your Honor -- as I speculated at the preliminary hearing, I could go over to the Brig, I could talk to this man for five minutes.

THE COURT: You can't even get in, Mr. Dunham. Don't worry.

MR. DUNHAM: Without your help. Without your help, I know.

THE COURT: Your chances of getting in there are between slim and none. You couldn't even get a marshal in there as I understand it.

MR. DUNHAM: My problem is not with getting in. It may be with getting out.

THE COURT: No. They wouldn't do that to you, Mr. Dunham.

MR. DUNHAM: But the problem that I --

THE COURT: Send Larry Shelton, and then you wouldn't have to worry about it.

MR. DUNHAM: I would like to be able to send Larry.

The problem that I see with all this is you don't have counsel if you don't have access to counsel. It's like not having it. And so when the Congress passed 3006(a) they didn't say you have, you know, 2241, you can appoint counsel but you can't have the counsel see the man if it's an unlawful enemy declared -- in an undeclared war, rounded up somewhere in Afghanistan. They didn't put that exception in there. And I can't imagine any court saying --

THE COURT: Well, what we have is a question of -- the issue is whether the gentleman is a combatant and whether he's being properly held as a combatant under some authority of Congress or the United States or the Executive, whatever power it is. Somewhere he's got to have some authority for holding this particular individual, I would assume.

MR. DUNHAM: But that's --

THE COURT: That determination has to be made. It's a question of whether it exists or not; isn't that correct?

MR. DUNHAM: That's correct. But whether he's a combatant or not is a question of fact. It could be. It could be a mixed question of fact and law. But there is -- you know, because they label him a combatant doesn't make him so. He's got a right to say, hey, I wasn't a combatant; what

are you talking about?

THE COURT: He may be. Why else would they have picked him up?

MR. DUNHAM: They round up -- you know, we presented to the Court the news reports of 33 Kuwaitis over there doing charitable work and got rounded up and sent to Guantanamo.

THE COURT: They say they were doing charity work. You know, charity takes many forms. It takes a lot of forms, Mr. Dunham.

MR. DUNHAM: That's correct.

THE COURT: I have noticed a lot of people think they're doing charity when the opposite result is achieved, you know.

MR. DUNHAM: It also may make a difference who he's affiliated with, whether he's affiliated with al Qaida or Taliban. If he's affiliated with Taliban, that thing is over. There is a new government. The Taliban is gone, surrendered. Even if you have an informal war, that's over.

There is a whole lot of questions that may -- factual issues that may bear on this thing. And what I'm basically urging the Court to do is to allow me to see him so I can develop his side of the facts. And guess what? It's quite possible that this man could tell me, look, you're a Christian infidel, I don't want to talk to you, I don't know

why you filed this petition for me. I'm not interested. I could come back and save everybody a lot of trouble. And it doesn't seem --

THE COURT: I just don't believe that's going to happen, Mr. Dunham. Somehow or another I just don't think that's going to happen.

MR. DUNHAM: But I do think, Your Honor, to proceed with a hearing in the case without me having talked to my client is not giving him the relief that all of the statutes and all of the history of the cases in this area suggest he's entitled to.

THE COURT: Well, I understand your position, Mr. Dunham.

All right. Mr. Garre -- is it Garre?

MR. GARRE: Your Honor --

THE COURT: What do you have to say about what Mr. Dunham is saying? He's saying in essence it's extremely difficult for a person to engage in any legal transaction or situation without counsel. And, indeed, it seems to me that it would be beneficial to all concerned.

MR. GARRE: Several things, Your Honor.

THE COURT: All right.

MR. GARRE: First of all, we think that we should -- we would ask the Court for an opportunity to present the showing to this court why we believe -- we have

determined Mr. Hamdi is an enemy combatant and we can lawfully hold him. The types of arguments that Mr. Dunnam is making now --

THE COURT: One of the questions he raised I think, is a very good question. Do you have any case anywhere where any person who brought a writ was denied the right to counsel? Do you have any case anywhere?

MR. GARRE: We will be making -- I can't cite to you --

THE COURT: Since the Magna Carta have you heard of such a case? Maybe you've got one somewhere back in the 13th Century.

MR. GARRE: Certainly the cases which involved situations where enemy combatants are being held -- the Quirin case Mr. Dunham mentioned that involved a case where charges have been brought against an individual so that it did involve a case where --

THE COURT: If you don't ever bring charges you can hold him forever? Is that it?

MR. GARRE: Our position is we can hold him consistent with the doctrine I have discussed and that we'll explain to the Court. It s not a situation --

THE COURT: But I'm having some problems. I'm merely asking you about counsel. You are saying if he's charged with a crime that would jail him he's entitled to

counsel. If we don't charge him with a crime we can keep him in jail forever. That sounds idiotic, doesn't it?

MR. GARRE: There has been no assertion Mr. Hamdi or any of the other detainees are going to be held in jail indefinitely. They are being held --

THE COURT: Is he being held for one month, two months? Is it six months? Is it six years? How much time? He's been there now long? He's been there since from -- you said from the fall. He's been there over six months. If he were charged in this country with anything to put him in jail for six months would require counsel.

MR. GARRE: Your Honor, there have been countless individuals who have been held as enemy combatants or as prisoners of war who have not been provided access to counsel.

THE COURT: I totally agree with you.

MR. GARRE: Although Mr. Dunham says there is no case -- the proposition counsel should not be entitled to access, there is not a single case we're aware of that the Court ordered an enemy combatant be provided access to a counsel while he's being held to --

THE COURT: There is going to be a first time, isn't there? Always a first time.

MR. GARRE: The moment access is granted to counsel, Your Honor, it irreparably affects the relationship

and the reasons for which Mr. Hamdi is being held.

THE COURT: You mean in six months you all haven't been able to interrogate him? You know, somebody lost their ability to communicate or something?

MR. GARRE: It involves an ongoing process. Mr. Hamdi has been involved in that process.

THE COURT: How long does it take to interrogate someone?

MR. GARRE: It can vary based on the individual. What's important is to establish the relationship between the questioner and the detainee, the relationship of trust and dependence. The moment counsel is inserted in between the questioner and those who detain him, that relationship is destroyed. You can't go back on that. And before the Court orders that that kind of access be provided, we ask that at a minimum the Government be able to show the full -- to fully address the issue.

THE COURT: I tell you what I'm going to do. I'm going to order it. I'm going to order it. How much time do you want to go to the Supreme Court or any other court that says this person isn't entitled to counsel? How much time do you want?

MR. GARRE: Well --

THE COURT: Do you want 24 hours, 48 hours, or 72 hours?

MR. GARRE: Well, we would ask --

THE COURT: How much time do you want to go to any judge anywhere in any higher court to tell me that a man is not entitled to counsel in a case pending in this court?

MR. GARRE: Your Honor, we would ask that the Court give us sufficient time to make that determination.

THE COURT: All right. I'll give you sufficient time. How long does it take for you to get to Richmond or to Washington, D. C.? Tell me. How long does it take for you to print a petition? Because this person is going to be entitled to counsel in this court. But I'm going to give you a right to go to any judge in the Circuit Court or the United States Supreme Court and say that Hamdi is not entitled to counsel in a habeas petition filed in this court.

MR. GARRE: Your Honor, we would ask to have the 72-hour period --

THE COURT: You get a 72-hour period.

MR. GARRE: -- to evaluate --

THE COURT: 72 hours from now, without any other court order overruling it, Mr. Dunham, you will interview, you or Mr. Shelton, will -- one or the other, no double cases -- one or the other will interview Mr. Hamdi, if he desires to be interviewed after you explain who you are. You have 72 hours from this moment on. And, regardless of anything else, you have 72 hours from now you can walk into

that United States Naval Brig.

MR. GARRE: Your Honor --

THE COURT: I am ordering the United States to allow access to Mr. Dunham or Mr. Shelton, one or the other, with an interpreter to interview Mr. Hamdi.

MR. GARRE: Your Honor --

THE COURT: 72 hours from now.

MR. GARRE: If I could make one request which is related to that. If you would permit the parties to try to agree to a special administrative order involving access to counsel. In any other situation in which counsel is provided access to someone who is being detained in connection with the types of activities in which Mr. Hamdi is being detained, courts have entered a special administrative order governing the conditions under which communications take place, the range of subjects, the presence of interpreters. If Your Honor would allow the parties to --

THE COURT: I'm going to allow him access to Mr. Hamdi, as any lawyer would have access to his client, in private, in private, with an interpreter; however, he will be under guard, of course. I'm not saying -- they will be in some position that's in private, with no listening device by any party or person of the United States or any other party. No recording of any kind will be taken. His communication with counsel will be private. So that we understand that. I

don't want any tapes, any hidden microphones, anything, period.

MR. GARRE: If I understand Your Honor --

THE COURT: 72 hours from now.

You can go up. Maybe you can find a judge that says the man is not entitled to counsel in a writ of habeas corpus. We're in a new situation in the United States.

MR. GARRE: But if the Court would allow us to submit a paper to allow us to try to agree to arrangements with the Public Defender and submit the type of special administrative order which is approved by the Court, which is in place in any other situation in which someone like Mr. Hamdi who has been charged with a crime is provided access to counsel, those sorts of things are spelled out in advance under the order which is approved by the Court, so that there is no confusion about the conditions that take place. And we could try to work that out with Mr. Dunham, and, if need be, get something to the Court later today or tomorrow morning, so that we have that opportunity to make those conditions absolutely clear.

THE COURT: I don't mind you working out something that arrives at --

MR. DUNHAM: I'm pleased to work with him on something like that, Your Honor.

THE COURT: I'm not interested in that. I'm

interested in the fact we have a case pending, and I feel that the individual concerned has a right to counsel. That's all I'm saying. And I do think in any case which a person is being held he has a right to counsel.

The question that is here is a question of fundamental justice. Is he being properly held? Why was he brought here? Does this particular Executive order pertain to him or is there some other order that pertains to him? What authority is he being held under? And if we have the appropriate authority there is no problem. But he still has a right to counsel, and, consequently, I'm affording him that right, and he will have it within 72 hours.

Now, if you work out something, I'm not making it any less or longer or anything, because I want to give him ample opportunity to be able to answer and to obtain information that may answer whatever you may file on the 13th. And if Mr. Dunham needs extra time, we may be able to arrange that also. But the fact of the matter is that on the 13th you have to show cause why the gentleman is being held.

MR. GARRE: Yes, Your Honor. We fully intend to do so.

THE COURT: If you can work out an order I'm happy to have it, but I want it today, end of the day. 5 o'clock is fine. If you can have it by 5 o'clock, I'll be glad to enter it. I'm not trying to rush you. But it's not going to

be more than 72 hours from now. 72 hours from 1:00 p.m. today. So where does that make it? 72 hours is three days, right?

MR. GARRE: Yes, Your Honor.

THE COURT: So you're going to have to allow him in. I'm giving you 72 hours because maybe you can find some judge that will say he's not entitled to counsel. If you can, more power to you then. I think there are 10 Circuit Court Judges, nine Supreme Court Justices. All you have to do is find one of them. You may be able to figure out -- out of all those people you may be able to figure out -- is it more than -- 11, 12 maybe, Circuit Court Judges. 12 now. So you can add all those together. If you find anyone that says he's not entitled to counsel, that's fine, set aside my order and stay it, okay?

MR. GARRE: Your Honor, I believe the 72 hours would fall on 1:00 p.m. on Saturday.

THE COURT: Well, those guys work on Saturday too.

MR. GARRE: Okay, Your Honor.

THE COURT: You will find for this thing they'll work on Saturday. If you can't find one by Friday that will set aside this order, you aren't going to find one.

MR. GARRE: Yes, Your Honor. Thank you very much for allowing me to appear.

THE COURT: Anything else?

MR. DUNHAM: No, Your Honor.

THE COURT: See if you can work that order out. We'll recess.

(Proceedings were concluded at 1:40 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile, RMR

Date

U.S. Treaties on LEXIS

MULTILATERAL

PROTECTION OF WAR VICTIMS: Prisoners of War

TIAS 3364

6 U.S.T. 3316; 1949 U.S.T. LEXIS 483

August 12, 1949, Date-Signed

February 2, 1956, Date-In-Force

STATUS:

[*1] Convention, with annexes, dated at Geneva August 12, 1949.
Ratification advised by the Senate of the United States of America, subject to a statement, July 6, 1955;
Ratified by the President of the United States of America, subject to said statement, July 14, 1955;
Ratification of the United States of America deposited with the Swiss Federal Council August 2, 1955;
Proclaimed by the President of the United States of America August 30, 1955;
Date of entry into force with respect to the United States of America: February 2, 1956.

CONVENTION DE GENEVE RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE DU 12 AOUT 1949
GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949
RESERVES FAITES A L'OCCASION DE LA SIGNATURE DES CONVENTIONS DE GENEVE DU 12 AOUT 1949 POUR LA PROTECTION DES VICTIMES DE LA GUERRE
RESERVATIONS MADE AT THE TIME OF SIGNATURE OF THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS OF AUGUST 12, 1949

TEXT

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Geneva Convention relative to the Treatment of Prisoners of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on [*2] behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

PART I

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not [*3] be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: -

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal [*4] dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized [*5] resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, [*6] of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by [*7] neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations

exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed [*8] a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

ARTICLE 6

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

ARTICLE 7

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by [*9] the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

ARTICLE 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

ARTICLE 9

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian [*10] organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

ARTICLE 10

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned [*11] or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

ARTICLE 11

In cases where they deem it advisable in the interest of protected persons particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, [*12] each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II

GENERAL PROTECTION OF PRISONERS OF WAR

ARTICLE 12

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When [*13] prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

ARTICLE 13

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults [*14] and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

ARTICLE 14

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

ARTICLE 15

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

ARTICLE 16

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any

adverse distinction based on race, nationality, religious belief or political opinions, [*15] or any other distinction founded on similar criteria.

PART III

CAPTIVITY

SECTION I

BEGINNING OF CAPTIVITY

ARTICLE 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical [*16] or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

ARTICLE 18

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents [*17] to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said

receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their [*18] captivity.

ARTICLE 19

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

ARTICLE 20

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

SECTION II

INTERNMENT OF PRISONERS OF WAR

CHAPTER [*19] I

GENERAL OBSERVATIONS

ARTICLE 21

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the

improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity [*20] with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

ARTICLE 22

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

ARTICLE 23

No prisoner of war may at any time be [*21] sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

ARTICLE 24

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described [*22] in the present Section, and the prisoners therein shall have the same treatment as in other camps.

CHAPTER II

QUARTERS, FOOD AND CLOTHING OF PRISONERS OF WAR

ARTICLE 25

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

ARTICLE 26

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of [*23] weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

ARTICLE 27

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining [*24] Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

ARTICLE 28

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit

of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

CHAPTER III

HYGIENE AND MEDICAL ATTENTION

ARTICLE 29

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners [*25] of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

ARTICLE 30

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the [*26] blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.

ARTICLE 31

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially [*27] tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

ARTICLE 31

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.

CHAPTER IV

MEDICAL PERSONNEL AND CHAPLAINS RETAINED TO ASSIST PRISONERS OF WAR

ARTICLE 33

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration [*28] to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in [*29] Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.

(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

CHAPTER V

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

ARTICLE 34

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises [*30] shall be provided where religious services may be held.

ARTICLE 35

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

ARTICLE 36

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, [*31] to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.

ARTICLE 37

When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.

ARTICLE 38

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall [*32] take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

CHAPTER VI

DISCIPLINE

ARTICLE 39

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

ARTICLE 40

The wearing of badges of rank and nationality, as well [*33] as of decorations, shall be permitted.

ARTICLE 41

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, in places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

ARTICLE 42

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

CHAPTER VII

RANK OF PRISONERS OF WAR

ARTICLE 43

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another [*34] the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

ARTICLE 44

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

ARTICLE 45

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

CHAPTER [*35] VIII

TRANSFER OF PRISONERS OF WAR AFTER THEIR ARRIVAL IN CAMP

ARTICLE 46

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

ARTICLE 47

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by [*36] the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

ARTICLE 48

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners'

community property and of the luggage they are unable to take with them [*37] in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

SECTION III

LABOUR OF PRISONERS OF WAR

ARTICLE 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

ARTICLE 50

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) agriculture;
(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and [*38] chemical industries; public works and building operations which have no military character or purpose;
(c) transport and handling of stores which are not military in character or purpose;
(d) commercial business, and arts and crafts;
(e) domestic service;
(f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

ARTICLE 51

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work, account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do [*39] and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

ARTICLE 52

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

ARTICLE 53

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive [*40] hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

ARTICLE 54

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

ARTICLE 55

The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required [*41] to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

ARTICLE 56

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of

their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

ARTICLE 57

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for [*42] by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

SECTION IV

FINANCIAL RESOURCES OF PRISONERS OF WAR

ARTICLE 58

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed to their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of [*43] the prisoners concerned. The Detaining Power will establish the necessary rules in this respect.

ARTICLE 59

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

ARTICLE 60

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

Category I: Prisoners ranking below sergeants: eight Swiss francs.
Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.
Category III: Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV: Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: [*44] sixty Swiss francs.
Category V: General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

ARTICLE 61

The Detaining Power shall accept for distribution [*45] as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

ARTICLE 62

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners [*46] who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representative, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

ARTICLE 63

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows: the [*47] Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

ARTICLE 64

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

(1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.

(2) The payments made to the prisoner in cash, or in any other similar form; the payments made [*48] on his behalf and at his request; the sums transferred under Article 63, third paragraph.

ARTICLE 65

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners' representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

ARTICLE 66

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed [*49] by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

ARTICLE 67

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

ARTICLE [*50] 68

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, [*51] signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

SECTION V

RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

ARTICLE 69

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

ARTICLE 70

Immediately upon capture, or not more than one week after arrival at a camp even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address [*52] and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner

ARTICLE 71

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary [*53] reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

ARTICLE 72

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments [*54] sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving

assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

ARTICLE 73

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which [*55] are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

ARTICLE 74

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners [*56] of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

ARTICLE 75

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to [*57] supply them

with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;

(b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

ARTICLE 76

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by [*58] the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

ARTICLE 77

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123, of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take [*59] what measures are necessary for the authentication of their signatures.

SECTION VI

RELATIONS BETWEEN PRISONERS OF WAR AND THE AUTHORITIES

CHAPTER I

COMPLAINTS OF PRISONERS OF WAR RESPECTING THE CONDITIONS OF CAPTIVITY

ARTICLE 78

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Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

CHAPTER II

PRISONER OF WAR REPRESENTATIVES [*60]

ARTICLE 79

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. [*61] In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers.

Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

ARTICLE 80

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

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In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative, in addition to the special duties entrusted to him by other provisions of the present Convention. [*62]

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

ARTICLE 81

Prisoners' representatives shall not be required to perform any other work if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners' representatives for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and the bodies which give assistance to prisoners of war. Prisoners' representatives of labour detachments shall enjoy the same facilities [*63] for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefor shall be communicated to the Protecting Power.

CHAPTER III

PENAL AND DISCIPLINARY SANCTIONS

I. General Provisions

ARTICLE 82

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

ARTICLE 83 [*64]

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

ARTICLE 84

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

ARTICLE 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

ARTICLE 86

No prisoner of war may be punished more than once for the same act [*65] or on the same charge.

ARTICLE 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

ARTICLE 88

Officers, non-commissioned officers and men who are prisoners of war undergoing a [*66] disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

II. Disciplinary Sanctions

ARTICLE 89

The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.

(2) Discontinuance of privileges [*67] granted over and above the treatment provided for by the present Convention.

(3) Fatigue duties not exceeding two hours daily.

(4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

ARTICLE 90

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments if the duration of one of these is ten days or more.

ARTICLE 91

The escape of a prisoner of war shall be [*68] deemed to have succeeded when:

(1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;

(2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;

(3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

ARTICLE 92

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must [*69] be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

ARTICLE 93

Escape or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

ARTICLE 94

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

ARTICLE 95

A prisoner of war accused of an offence [*70] against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

ARTICLE 96

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding [*71] the offences of which he is accused and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners' representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

ARTICLE 97

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war [*72] and shall be under the immediate supervision of women.

ARTICLE 98

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained [*73] in such parcels.

III. Judicial Proceedings

ARTICLE 99

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ARTICLE 100

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power on which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in [*74] its power as the result of circumstances independent of his own will.

ARTICLE 101

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ARTICLE 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ARTICLE 103

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement [*75] awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ARTICLE 104

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This

period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) Surname and first names of the prisoner of war, his rank, his army regimental, personal or serial number, his date of birth, and his profession or trade, if any;

(2) Place of internment or confinement;

(3) Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the [*76] trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate [*77] or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* [*78] in the

interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, [*79] if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;

(2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;

(3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ARTICLE 108

Sentences pronounced on prisoners of war after a conviction has become duly enforceable shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women. [*80]

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

PART IV

TERMINATION OF CAPTIVITY

SECTION I

DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

ARTICLE 109

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation [*81] in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

ARTICLE 110

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in [*82] a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

(1) Those whose state of health has deteriorated so as to fulfil the conditions laid down for direct repatriation.

(2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation [*83] and accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

ARTICLE 111

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

ARTICLE 112

Upon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

ARTICLE 113

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories [*84] listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing Article:

(1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.

(2) Wounded and sick proposed by their prisoners' representative.

(3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

ARTICLE 114

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have [*85] the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

ARTICLE 115

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

ARTICLE 116

The cost of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

ARTICLE 117

No repatriated person may be employed on active military service.

SECTION II

RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

ARTICLE 118

Prisoners of war [*86] shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners [*87] of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

ARTICLE 119

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation, any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can [*88] reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in the charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

SECTION III

DEATH OF PRISONERS OF WAR

ARTICLE 120

Wills of prisoners of war shall be drawn up [*89] so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates, in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of [*90] war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the [*91] Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

ARTICLE 121

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

PART V

INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR

ARTICLE 122

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners [*92] of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers [*93] and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above.

Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those [*94] who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

ARTICLE 123

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned [*95] the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of

war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross or of the relief societies provided for in Article 125.

ARTICLE 124

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

ARTICLE 125

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet [*96] any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or [*97] very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

PART VI

EXECUTION OF THE CONVENTION

SECTION I

GENERAL PROVISIONS

ARTICLE 126

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They

shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, [*98] and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

ARTICLE 127

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

ARTICLE 128

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during [*99] hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

ARTICLE 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit [*100] by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

ARTICLE 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

ARTICLE 131

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 132

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, [*101] the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II

FINAL PROVISIONS

ARTICLE 133

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

ARTICLE 134

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

ARTICLE 135

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague.

ARTICLE 136

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which [*102] opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

ARTICLE 137

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 138

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

ARTICLE 139

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

ARTICLE 140

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions [*103] to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 141

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

ARTICLE 142

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect [*104] only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

ARTICLE 143

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

PEOPLE'S REPUBLIC OF ALBANIA

Mr. MALO, First Secretary to the Albanian Legation in Paris:

(1) Convention for the Amelioration of the Condition of the Wounded and Sick [*105] in Armed Forces in the Field.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

(2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

(3) Convention relative to the Treatment of Prisoners of War.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the prisoners of war are nationals has given its consent."

Article 12: "The People's Republic of Albania considers that in the case of prisoners [*106] of war being transferred to another Power by the Detaining Power, the responsibility for the application of the Convention to such prisoners of war will continue to rest with the Power which captured them."

Article 85: "The People's Republic of Albania considers that persons convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, of war crimes and crimes against humanity, must be treated in the same manner as persons convicted in the country in question. Albania does not, therefore, consider herself bound by Article 85 so far as the category of persons mentioned in the present reservation is concerned."

(4) Convention relative to the Protection of Civilian Persons in Time of War.

Article 11: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

Article 45: "The People's Republic of Albania considers that in the case of protected persons being transferred to another Power by the Detaining Power, [*107] the responsibility for the application of the Convention to such protected persons will continue to rest with the Detaining Power."

ARGENTINA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI	)	
ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,	)	
Petitioners,	)	
v.	)	CASE NO. 2:02CV439
DONALD RUMSFELD Secretary of Defense	)	
COMMANDER W.R. PAULETTE, Norfolk Naval Brig	)	
Respondents.	)	

DECLARATION OF FRANK W. DUNHAM, JR.

1. My name is Frank W. Dunham, Jr., and I am the Federal Public Defender for the Eastern District of Virginia. I currently represent Yaser Esam Hamdi who is being held in the Naval Brig in Norfolk.

2. I have been in communication with Attorney Tony West, counsel for John Walker Lindh, an American citizen and defendant charged generally in this district with Title 18 offenses

after being captured with a Taliban unit in Afghanistan. (*See United States v. John Phillip Walker Lindh*, Crim. No. 02-37-A, Alexandria Division). To the extent further detail on this case is required, it is respectfully suggested that this Court take notice of its own proceedings.

3. As a result of direction from Judge Ellis in *Lindh* (*see* attached transcript excerpts), I was contacted by Tony West in late May or early June of this year. Mr. West wanted my permission to speak to Mr. Hamdi.

4. Mr. West explained at that time, and has recently reaffirmed in more detail, that he wanted to speak to Mr. Hamdi because he was provided by the government with statements and/or government summaries of statements attributed to Mr. Hamdi which were deemed by the government and the Court in *Lindh* to be exculpatory to Mr. Lindh on the issues of:

a. whether Mr. Lindh was an enemy combatant;

b. whether Mr. Lindh bore arms against Americans;

c. whether Mr. Lindh was part of an uprising of prisoners captured by the Northern Alliance.

5. Mr. West could not tell me what specifically was in the statements because he is subject to a protective order, but he says they are definitely not classified. While unable to provide detail, he did say that since these statements were clearly exculpatory to *Lindh* on these particular issues, it might not be unreasonable to infer that they are equally exculpatory in nature to *Hamdi* on these issues.

6. *Lindh* counsel advises that while Mr. Lindh has firsthand knowledge concerning Mr. Hamdi, he cannot be interviewed by third parties due to the Special Administrative Measures under which he is being detained.

FRANK W. DUNHAM, JR.

Judge Ellis re Yaser Hamdi
8/9/02 5:00:05 PM Eastern Daylight Time
KEfigenio@molo.com (Efigenio, Kerry A.)
tdunham@aol.com

Dunham, here is excerpts from the 5/28 and 5/31 court hearings regarding Mr. Hamdi.

Efigenio
315-268-7210

esday, May 28, 2002

ATTORNEY HARRIS: His name is Isaam Hamdi (phonetic), and he has been the subject of a government report that has been produced under Brady as material and

exculpatory.

THE COURT: Yes. Well, I think I recall the report, but I don't recall that he was in Norfolk. Is that where he is now?

ATTORNEY DAVIS: Yes, your Honor.

THE COURT: I take it time he is not charged or indicted at this time.

ATTORNEY DAVIS: I'm sorry, your Honor?

THE COURT: He is not charged and indicted at this time?

ATTORNEY DAVIS: That's correct. He does continue to be viewed as an enemy combatant, and in that way is like the other detainees. That is, he has -- well, I believe he has joint Saudi/U.S. citizenship, and was, for all intents and purposes, a Saudi combatant in

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Afghanistan, like many of the others.

THE COURT: Well, I told you before I have never understood this dual citizenship. I know it has some sanction in some of the cases. But every time I administer the oath of citizenship to new citizens once a month, they have to give up, renounce, abjure all of their fidelity and loyalty to any other prince or potentate, and have to give up their passports.

I don't see how you can be a citizen of this country and some other country. Maybe some other countries can see it, but I don't. In any event, that's not relevant at this time.

He is not to be moved, is he, from Virginia?

ATTORNEY DAVIS: No; at least now, no, your

Honor.

THE COURT. All right. Well, Mr. Harris would like to talk to him, I am sure.

Is that right, Mr. Harris?

ATTORNEY HARRIS: Yes, your Honor.

THE COURT. And I want to know why he shouldn't be able to talk to him, since he is in Virginia, and none of the arguments you've made elaborately ly and forcefully in the other pleadings apply to him.

THE COURT: Well, let me suggest to you, and you can take it as a direction, that counsel in

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Norfolk advise the Court of this issue and that I want it resolved promptly; not that that tells the Norfolk judge that the Norfolk judge needs to do anything, but that I am going to resolve this issue promptly.

And the fact that the district judge in Norfolk may take it under advisement is entirely up to the district judge there. But I am not sure that it makes a big difference to me.

This person is probably down at the naval operating base in a brig, right?

ATTORNEY DAVIS: I think so, your Honor. Yes.)

THE COURT: Well, that's under the Department of Defense custody. And unless I am really moved by some reason why the national security is really affected by having Mr. Harris go down and meet with him,

I am likely to let it happen, whether he has a lawyer or not.

Now, this person can always decline to be interview. That's his right. Mr. Harris doesn't have any absolute right to talk to anybody. People can refuse to do it.

That's one of the advantages, as you point out, to the system that you suggest. As a practical matter, I don't know how big an advantage. I doubt that any of the detainees at Guantanamo Bay would refuse an opportunity to talk to anybody outside. That's what the manual says, and I think the manual has got the right

picture of the American justice system in that regard.

==========

THE COURT: All right, the record will reflect that this is United States against John Walker Lindh and that counsel are present and prepared to proceed.

Let me begin first with the Government's response. The Government, in compliance with the Court's direction, has filed a pleading reflecting the results of a hearing in Norfolk relating to Yaser Hamdi.

And, Mr. Bellows or Mr. Davis, whoever is going to address this -- Mr. Davis?

MR. DAVIS: Yes, Your Honor.

THE COURT: Mr. Davis, I take it that Judge Doumar has appointed Mr. Dunnam to represent Mr. Hamdi, and the Government is considering whether to seek relief from that order?

MR. DAVIS: That's correct, Your Honor. The order of May 29th does appoint Mr. Dunnam in the Federal Public Defender's office as counsel for Mr. Hamdi.

THE COURT: All right, now it seems to the Court that there are two separate considerations. One is whether defense counsel here can interview Mr. Hamdi, and that's, of course, at least for the time being a matter that they are free to pursue with Mr. Dunham directly. There is no reason why Mr. Harris or Mr. Brosnahan can't call Mr. Dunnam.

I think you might be willing to predict with some confidence what the results of that would be, but nontheless there is no reason why they shouldn't contact him, is there?

==========

THE COURT: So the matter is really premature at this time as to whether any subpoena is appropriately issued to that person, but I don't see any reason why you can't contact Mr. Dunham and talk to him about gaining access to Mr. Hamdi.

Mr. Dunham may well tell you, the answer is no for

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the time being. We'll wait until the Government appeal is over, and I will consider it again. I don't know what he is going to tell you, but that's predictable. But the subpoena itself seems premature.

Mr. Harris, do you want to address that, or Mr. Brosnahan?

==========

THE COURT: Well, Mr. Harris, it seems to me it's still premature. You can subpoena him, and I'll consider whether there is an objection to the subpoena at the appropriate time, and we will take it up.

In the meantime, if you want access to him, try Mr. Dunham. There is no reason why you can't call Mr. Dunham, but we will see whatever he says. He may not represent him for very long. I don't know. I don't know what the status of that will ultimately be.

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U.S.-BORN TALIBAN HELD IN NORFOLK

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Section: FRONT, page A1
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NORFOLK - A military jail at Norfolk Naval Station became the home Friday for an American-born man captured in Afghanistan as U.S. officials continued to wrestle with his legal status.

On a sunny but brisk afternoon, Yasser Esam **Hamdi**, 22, arrived at 2:15 at the base's Chambers Field. He was placed in a green government minivan with tinted windows and driven down Hampton Boulevard by military police escort, a short ride from the airstrip to the base's brig, officials confirmed. All day, access to the two-building compound ringed by barbed wire was blocked by armed guards and barricades on the entrance road.

Hamdi was seized by U.S. forces with fighters of the ruling Taliban militia and the al-Qaida terror network after a November prison uprising in the northern Afghan town of Mazar-e Sharif.

"Given the likelihood that **Hamdi** is an American citizen, it was deemed appropriate to move him to the United States," said Lt. Cmdr. Jeff Davis, a Pentagon spokesman. "As a captured enemy combatant, **Hamdi** remains in the control of the Department of Defense."

Hamdi left the U.S. naval base at Guantanamo Bay, **Cuba**, aboard a C-130 transport plane early Friday. His plane touched down at Dulles International Airport shortly after noon and took off again about 90 minutes later.

He had been at Guantanamo Bay since Feb. 11.

Officials did not explain why **Hamdi** was flown to Dulles and then moved to Norfolk.

No civilian criminal charges have been filed against **Hamdi**.

A Justice Department official said no decision has been made on

how to handle **Hamdi**'s legal status. Options include possible federal criminal charges or seeking a trial by military tribunal.

That decision is "a long way off," said the official, speaking on condition of anonymity.

Gen. Tommy Franks, commander of U.S. forces in Afghanistan, told reporters Friday that because **Hamdi** spoke English when he was captured, officials knew there was a possibility he might be American. Franks said the matter had not been resolved when **Hamdi** was transferred to Guantanamo Bay along with other prisoners captured in Afghanistan.

If federal charges are brought, **Hamdi** would be tried in one of the four U.S. District Courts in the Eastern District of Virginia - Alexandria, Newport News, Norfolk or Richmond. Federal law mandates that anyone charged with a federal crime who is brought into the country from a foreign nation must be tried in the district where the plane touches down.

While Alexandria seems the likely court of choice, the Norfolk court could still be an option because **Hamdi** will be housed nearby at the naval base, officials said. It was unclear why the Norfolk brig was chosen rather than a military confinement facility closer to Alexandria. The Marine Corps, for example, has a brig at Quantico, roughly 30 miles from the Alexandria courthouse, though it is certified to hold prisoners for no more than 90 days at a time.

Though the Washington area is home to a variety of military bases, another defense official suggested that the brig at Norfolk Naval Station is the closest military facility to Alexandria with the kind of security arrangements needed for a prisoner like **Hamdi**. Holding him there would facilitate a transfer to Justice Department custody when the proper time for that comes, the official said.

One official said Navy leaders had been told to prepare for **Hamdi**'s arrival in Norfolk but given no indication of how long he might be staying. The Norfolk brig can officially hold 145 prisoners.

"It's hardly state of the art," said Virginia Beach attorney Greg D. McCormack, who specializes in handling military cases. McCormack and another lawyer familiar with the facility described the brig's security as tight.

The brig, which opened in 1972 as the Naval Station Correctional Center, is located on an unsecured portion of the Norfolk base, well outside the gates and fencing that surround

the rest of the base. Just off Ingersoll Road, the three-story facility sits northwest of Camp Allen Elementary School and is visible from Interstate 564.

In 1973, the brig had a riot in which a dozen prisoners reportedly took over sections of the jail.

The brig is certified to confine prisoners from all branches of the armed services and also operates a correctional custody unit, which can hold 20 male and 10 female prisoners. That unit is designed to provide training and regimentation to junior sailors and return them to their units to complete their enlistments.

According to a Navy Web site, the brig's staff includes three officers, 120 enlisted sailors and six civilian employees.

McCormack, the lawyer, said the facility has a solitary-confinement block with about six, single-occupancy cells. Prisoners facing the most-serious charges are confined in those windowless cells, he said.

Typically, prisoners awaiting military trials known as courts-martial and those convicted and sentenced to prison terms of less than 36 months are held in the Norfolk brig, McCormack said.

A defense official suggested that the military would have preferred to turn **Hamdi** over to federal marshals, but the Justice Department was not prepared to move forward with charges.

John Walker Lindh, a former Californian who was dubbed "American Taliban," was captured at the same Afghan prison as **Hamdi** and awaits trial in Alexandria.

Lindh never was held at Guantanamo Bay. After being taken aboard a Navy ship in the Arabian Sea in November, he was flown Jan. 23 to Alexandria. He is charged with conspiring to murder Americans, providing support and services to foreign terrorist organizations, including al-Qaida, and using firearms and destructive devices during crimes of violence.

Before deciding **Hamdi**'s citizenship claims, Justice Department officials were reportedly researching whether he had ever sought dual citizenship or renounced his American citizenship.

Justice Department officials recently located a birth certificate backing up **Hamdi**'s claim that he was born in Baton Rouge, La., in 1979, while his Saudi parents worked there. He went to Saudi Arabia with his parents while still a toddler, Pentagon spokeswoman Victoria Clarke said Thursday.

Clarke said she did not know when **Hamdi** initially told U.S officials of his claim to American citizenship.

Reach Matthew Dolan at mdolan(AT)pilotonline.com or 446-2322. **Description of illustration(s):**
STEVE EARLEY PHOTOS/THE VIRGINIAN-PILOT
Military police escort a minivan transporting suspected American Taliban Yasser Esam **Hamdi** down Hampton Boulevard to the brig at the
Norfolk Naval Station on Friday. No decision has been made on how to
handle **Hamdi**'s legal status.

A Norfolk Naval Station police officer provides security as a motorcade carries the American Taliban suspect to the brig on Friday. The suspect was flown from Guantanamo Bay, Cuba, earlier in
the day.

COLOR PHOTOS
GENEVIEVE ROSS/THE VIRGINIAN-PILOT
IN NORFOLK: Armed guards block the road leading to the Norfolk Naval
Station brig, where American-born Taliban fighter Yasser Esam **Hamdi**,
22, was moved Friday.

TERRY RICHARDS/NEWS GROUP NEWSPAPERS LTD.
IN AFGHANISTAN: A Taliban prisoner identified as Yasser Esam **Hamdi**
is shown in December in Mazar-e Sharif following his capture. **Hamdi**
was eventually sent on to the U.S. detention center at Guantanamo
Bay, Cuba, before being moved Friday to the Norfolk Naval Station
brig. A birth certificate backs up **Hamdi**'s claim that he was born in
the United States.

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Thursday, August 8, 2002

Politics & Policy

More Terror Suspects May Sit in Limbo

White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens

By Jess Bravin

Washington – SUSPECTED TERRORISTS Jose Padilla and Yaser Hamdi – U.S. citizens being held in stateside Navy brigs without bail, charges, access to attorneys or the right to remain silent – may soon have company.

Stung by the courtroom circus that yet another accused terrorist, Zacarias Moussaoui, has created, and the aggressive defense marshaled by John Walker Lindh before he plea-bargained his way out of a possible life sentence, the Bush administration is preparing to expand its policy of indefinitely detaining in U.S. military jails people it designates as "enemy combatants." Such prisoners – whether Americans or foreigners captured in the U.S. – aren't afforded the same constitutional rights as criminal defendants, or even the limited rights allowed in military tribunals.

The White House is considering creating a high-level committee to decide which prisoners should be denied access to federal courts. The Goose Creek, S.C., facility that houses Mr. Padilla – mostly empty since it was designated in January to hold foreigners captured in the U.S. and facing military tribunals – now has a special wing that could be used to jail about 20 U.S. citizens if the government were to deem them enemy combatants, a senior administration official said.

U.S. citizens or aliens arrested on American soil have better claims to constitutional rights than the foreigners captured overseas who are being held at the U.S. Guantanamo Bay Naval Base in Cuba. This year, two federal judges have ruled that the Guantanamo detainees have no right to seek freedom in U.S. courts.

Raising the stakes this week in what could become a constitutional showdown, the administration refused a federal court's order to turn over intelligence documents related to the capture of Mr. Hamdi, who is imprisoned in Norfolk, Va., claiming the judge lacked the authority on procedural grounds. It also is trying to get his public defender removed from the case. Officials said they selected brigs in South Carolina and Virginia partly because they fall under the jurisdiction of courts that are more conservative and presumably more sympathetic to the administration. The Padilla case is being handled by a judge in New York, where a grand jury has been investigating terrorist activity, but the administration wants it transferred to Charleston, S.C.

The moves are part of a fierce fight the administration is waging to establish precedents in the two cases that would allow it to indefinitely detain more people it designates as wartime foes. The issues seem destined for the Supreme Court, which has a mixed record on such matters. During the Civil War, it barred the military detention of noncombatant Americans when federal courts are functioning, but it upheld the roundup of 120,000 Japanese-Americans and the secret trial and execution of Nazi saboteurs during World War II.

"There's a different legal regime that we're developing" to confront terrorism, a senior official said, melding the once-separate realms of civilian law and the law of war. Criminal law determines guilt and assigns punishment for past wrongdoing, but the law of war gives governments vast powers to prevent possible harm by imprisoning and interrogating enemy soldiers.

Does that mean future Moussaouis won't face civilian trials? "Not if we can help it," said a White House official.

Some in Congress consider the policy misguided. "The fact that somebody is despicable . . . is not enough under the tradition and history of this country to imprison them forever without them ever having a hearing," said Sen. John Edwards, a North Carolina Democrat.

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Critics point to Japanese-American internments that bars imprisoning citizens without charges to an act of Congress. The administration argues that the law doesn't apply to enemy combatants.

Attorney General John Ashcroft said last month that courts could hear petitions filed for such prisoners. But in papers filed Tuesday in the Hamdi case, the Justice Department argued for the narrowest possible review, saying a signed Pentagon declaration that Mr. Hamdi is an enemy combatant should settle the matter.

At the outset of the campaign against al Qaeda, the international Islamist network organized by Osama bin Laden, career federal prosecutors maintained that they are best suited to deal with terrorists. But the Moussaoui and Lindh cases soured top officials on that route.

After dropping the most serious charges against Mr. Lindh, prosecutors agreed to let him to plead guilty to aiding the enemy in Afghanistan, and he now faces 20 years in prison. But the elaborate defense put up by the Californian's lawyers drained government resources and threatened to expose intelligence, military techniques and personnel, and even to bring al Qaeda battlefield prisoners to the witness stand in the Alexandria, Va., federal courthouse. Mr. Moussaoui, a French citizen captured in Minnesota while allegedly conspiring to take part in the Sept. 11 plot, is representing himself and flooding the same court with bizarre and accusatory motions aimed at glorifying Mr. bin Laden.

By the time Mr. Padilla, an American from Chicago, was arrested in May, the administration already had tired of such games. Mr. Padilla is a onetime gang member who converted to Islam in the early 1990s. He was arrested after returning from Pakistan, where he allegedly took part in an al Qaeda plot to detonate a "dirty bomb" that would spread radioactive material in the U.S.

Originally jailed on a secret "material witness" warrant, Mr. Padilla was transferred to military custody on the eve of a hearing where a court-appointed lawyer was to seek his freedom. President Bush personally approved Mr. Padilla's transfer, but officials said they are considering procedures that wouldn't require presidential involvement in future cases.

Under one proposal, a committee of the attorney general, the defense secretary and the director of central intelligence would determine whether a U.S. citizen should go to military detention. If the prisoner were foreign, the national-security adviser also would be involved.

At least two prisoners now held as material witnesses could be candidates for combatant classification.

– James Ujaama, a U.S. citizen from Seattle, was arrested last month as part of an investigation into alleged plans to set up an al Qaeda-linked training camp in rural Oregon. He is jailed in Alexandria.

– Mohammed Mansour Jabarah, a Kuwaiti-born Canadian citizen, was arrested in Oman and turned over to the U.S. after allegedly plotting to blow up U.S. and Israeli embassies in Singapore. He is being held at Fort Hamilton in Brooklyn, N.Y., according to an administration official.

In Hanahan, S.C., next door to Mr. Padilla's brig, residents have their own concerns. "I didn't know they could lock you up without a trial," says Charles Bates, a retired shipyard worker whose house abuts the naval facility. His greater concern, however, is the possibility of retaliatory terrorist strikes against his town. "It's not helping the value of our property, having that brig there," he adds.

— INDEX REFERENCES —

NEWS SUBJECT: Defense Department; Armed Forces; Executive Government; Justice Department; September 11 Terrorist Attacks; Crime; Crime/Courts; Wall Street Journal; English language content; Domestic Politics; Political/General News; Politics; Acts Of Terror; Military Action; Government Bodies (GVDEF GDEF GVEXE GVJUS 911 CRM GCRIM WSJ ENGL GPOL GCAT PLT GTERR MLT GVBOD)

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The Washington Post

AN INDEPENDENT NEWSPAPER

Why Mr. Hamdi Matters

CONSIDERING what is known about Yaser Esam Hamdi, it is easy to lose sight of why his case is so important. The government claims that Mr. Hamdi—the Louisiana-born, Saudi-raised and likely American citizen who is currently being held indefinitely without charge or access to counsel in a military brig in Norfolk—is an enemy combatant. He was, the government says, captured when the Taliban unit to which he was attached surrendered to the Northern Alliance, and he has allegedly admitted to government investigators that he went to Afghanistan to train with and, if necessary, fight for the Taliban. His father's claim, made in a letter last week to members of Congress, that his son went as a relief worker is being greeted with skepticism. Mr. Hamdi is, in short, hardly a sympathetic character. Many Americans will be tempted to conclude that if people like him cannot be locked up easily, there must be some problem with the rules.

A remarkable story in Thursday's Wall Street Journal shows why this instinct may be wrong and why it is essential that the government be required to justify persuasively "enemy combatant" designations. The White House, the Journal reported, has become dismayed by the legal circus of the Zacarias Moussaoui trial and the strong defense put forth for John Walker Lindh. In reaction, it has determined that, rather than pursue civilian trials, the government should—assuming it prevails in the Hamdi and Jose Padilla cases—use enemy combatant detentions instead. A wing of a navy brig in Goose Creek, S.C., where Mr. Padilla—held in connection with an alleged dirty bomb plot—now resides, is available for Americans subject to military detentions. And a high-level committee, composed of the attorney general, the defense secretary and the CIA director—is being contemplated to decide which American citizens should be locked up with no rights. The White House did not

nor did it comment upon the accuracy of the Journal's story.

The government is right to worry about the chaos the Moussaoui trial has produced, which has been both dangerous and embarrassing. And few doubt that the military has the authority to detain enemy combatants—a long-standing feature of the laws of war. But the idea of using enemy combatant designations of citizens as a relatively routine means of handling terrorism cases is appalling. A cardinal protection of liberty in this country is the requirement that the government justify deprivations of freedom. Yet the emerging hallmark of the enemy combatant cases is the unwillingness of the government to do precisely that. In Mr. Hamdi's case, the Justice Department initially argued that its designation was unreviewable by any court. Even now, after an appeals court cast doubt on that position, the government contends that the courts should not look beyond the sketchiest of evidentiary statements it has offered in justifying its view of Mr. Hamdi. Creating a regime under which these detentions would be a norm, rather than an extraordinary exception, would be extremely dangerous.

For this reason, it is critical that judges remember how the doctrine they are creating could be used against people other than the ones whose cases they are currently seeing. The government's case against Mr. Hamdi may be solid. But if it is allowed to detain him without some procedure that requires a persuasive showing, it will create a rule that allows Americans to be exempted from the protections of the Bill of Rights on the strength of a two-page statement the government condescends to present in court. A goodly number of people in this country have controversial political beliefs or associate with people who might turn out to be terrorists. Whatever process is used to lock up Americans must be capable of distinguishing

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI as next friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia,

Respondents.

CIVIL ACTION
NO. 2:02cv439

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

August 13, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR., ESQUIRE
LARRY M. SHELTON, ESQUIRE
GEREMY C. KAMENS, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

THE CLERK: Case number 2:04cv439, Yaser Esam Hamdi, et al. versus Donald H. Rumsfeld and Commander W. R. Paulette.

Mr. Dunham, is the petitioner ready to proceed?

MR. DUNHAM: We are, Your Honor.

THE CLERK: Mr. Garre, are the respondents ready?

MR. GARRE: Yes, we are, Your Honor.

THE COURT: This case does represent a balance that must be struck between the executive's authority in times of conflict and the procedural safeguards that our Constitution provides for U. S. citizens that are detained on United States soil.

This court recognizes, and the Fourth Circuit has made clear, that the government is entitled to considerable deference in detention decisions during hostilities; however, the Fourth Circuit in declining to dismiss the case also stated that it refused to summarily embrace the sweeping proposition that any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.

In addition, I had previously issued some orders trying to find certain information; however, on August the 8th the Court of Appeals held, in accordance with the principles set forth in an opinion of July the 12th the District Court shall consider the sufficiency of the Mobbs' Declaration as an independent matter before proceeding further.

Interpreting this, it's clear that I can only interpret the Mobbs' Declaration to determine if it is sufficient. And that is what this proceeding is about. It's without the presence of Mr. Hamdi. It's without anyone talking to Mr. Hamdi. It's without Mr. Hamdi having a right to say anything. It is solely on the presentation of the executive that he is an unlawful enemy combatant, which they have alleged.

On that I will hear from Mr. Garre as to why he believes it is sufficient. And then I will hear from Mr. Dunham as to why he believes it's insufficient. And then I may question them both later.

All right, Mr. Garre.

MR. GARRE: Thank you, Your Honor.

Your Honor, the respondents' position is that the Mobbs' Declaration provides a factual basis for the military's determination that Mr. Hamdi is indeed an enemy combatant who was captured during the hostilities in Afghanistan and that the military's detention of Mr. Hamdi is therefore lawful. For those reasons we think the Court should grant the government's motion to dismiss the petition in this case.

Now, the Fourth Circuit's order asked the Court to inquire into the sufficiency of the Mobbs' Declaration. We think that the Mobbs' Declaration satisfies the limited standard of review that the Fourth Circuit recognized would

apply in this case consistent with the overarching separation of powers and principles which must inform proceedings such as this.

The Fourth Circuit's most recent decision in this case lays out what it calls cardinal principles that we think are particularly relevant to the inquiry that is now before the Court in this habeas petition. The habeas petition, of course, raises several purely legal issues with respect to whether or not Mr. Hamdi can be detained simply because he is an American citizen, whether or not the statute relied on by the petitioners, 18 U.S.C. 4001, presents a bar to Mr. Hamdi's detention. They raise certain other claims which in no way would require a court to consider even the sufficiency of the Mobbs' Declaration, to hear from Mr. Hamdi, to --

THE COURT: Do you think no one should even consider the sufficiency?

MR. GARRE: Excuse me, Your Honor?

THE COURT: Do you think no one should even consider the sufficiency?

MR. GARRE: We think the Court of Appeals has directed this court to consider that, and we think that's an appropriate inquiry under the Court's recent decision. I'm just trying to explain that there are several legal issues.

THE COURT: Let me ask you another question. Has the writ of habeas corpus been vacated?

MR. GARRE: It hasn't.

THE COURT: Is this a habeas corpus petition?

MR. GARRE: Your Honor, they have filed a habeas corpus petition.

THE COURT: Do you maintain that they can't?

MR. GARRE: Yes, we do, Your Honor. We've made clear in this case --

THE COURT: Has the President done anything to eradicate the habeas corpus?

MR. GARRE: No, Your Honor. In one of the claims they made --

THE COURT: Did Congress do anything to eradicate the habeas corpus?

MR. GARRE: No, Your Honor. One of the claims they made was the writ was suspended in this case. As far as I can tell, they have abandoned --

THE COURT: If the writ wasn't suspended, then why would just the decision of the executive be final?

MR. GARRE: Your Honor, the reason why the courts have a very limited role in this type of proceeding is because, as the Fourth Circuit recently stated, under our constitutional system the executive is the branch which is in the best position to make the military determinations necessary to the capture and detention of enemy combatants.

THE COURT: So the Constitution does not apply to Mr.

Hamdi is that correct?

MR. GARRE: Well, I think it applies to Mr. Hamdi as it did to the individual who was alleged to be an American citizen in the Quirin case. In that case the Supreme Court held -- and I think it's fair to say that the Court of Appeals in this case recognized --

THE COURT: Mr. Hamdi wasn't a spy. In the Quirin case we had people who came ashore to destroy the or to sabotage the United States in time of war and were not in uniform. They were unquestionably in the category of spies; isn't that correct?

MR. GARRE: That's correct in the Quirin case, Your Honor. This case involves the detention of the individual --

THE COURT: In the Quirin case did they have counsel?

MR. GARRE: Your Honor, that case involved military charges that were brought against the saboteurs that resulted in --

THE COURT: All I asked is did they have counsel?

MR. GARRE: As I understand it, they did for the limited purpose of the proceeding that resulted in --

THE COURT: Was counsel able to speak with them?

MR. GARRE: Yes, Your Honor.

THE COURT: Well, in --

MR. GARRE: But if I could --

THE COURT: Is there any case that you know of, any

habeas corpus petition that you've ever heard of, prior to this case where counsel could not speak to the person being held?

MR. GARRE: Your Honor, if I could answer that this way:

THE COURT: Just answer it. Have you ever heard of such a case? You can answer.

MR. GARRE: Neither side has pointed to authority directly on point, but if I could explain that, Your Honor, with respect --

THE COURT: I'm going to allow you to explain it.

MR. GARRE: Thank you.

THE COURT: But could you answer the question?

MR. GARRE: Yes.

THE COURT: The question is -- the answer is what?

MR. GARRE: The answer is no. Neither side has pointed to an authority directly on point that --

THE COURT: I didn't ask Mr. Dunnam. He may find some authority.

MR. GARRE: What the Fourth Circuit has said in this case, and I would direct the Court to that decision, is that if Mr. Hamdi is indeed an enemy combatant his detention, his present detention, is a lawful one. Now, during the argument in that case Chief Judge Wilkinson made an observation which is perfectly accurate. That's since time immemorial armies during warfare have captured and detained combatants in warfare. He

also made the following hypothetical, which I think is appropriate here.

THE COURT: Did this man -- I didn't hear anything in the Mobbs' Declaration that indicated that he fought anyone. Is there anything in the Mobbs' Declaration -- is there anything in here that says that Hamdi shot at anyone?

MR. GARRE: No, Your Honor.

THE COURT: Is there anything in here that said Hamdi ever fired a weapon?

MR. GARRE: Your Honor, what the Mobbs' Declaration says is that Hamdi --

THE COURT: Is there anything in the Mobbs' Declaration that says Hamdi ever fired a weapon?

MR. GARRE: Your Honor, the declaration does not say that. What it does say is that Mr. Hamdi surrendered with an enemy unit, surrendered his AK-47 to -- along with an enemy Taliban unit in Afghanistan during the period of hostilities.

THE COURT: I have it in front of me, so we'll discuss it piece by piece. First, let's discuss the question of the person who made this declaration. It says he is a special advisor.

Was he appointed by the President with the consent of the Senate?

MR. GARRE: That is my understanding, Your Honor.

THE COURT: He was?

MR. GARRE: That's my understanding.

THE COURT: He was appointed by the President with the consent of the Senate?

MR. GARRE: No, Your Honor. Actually, if I could clarify that, the Under Secretary --

THE COURT: So I could go on the computer and find out when the President appointed Mr. Mobbs with the consent of the Senate?

MR. GARRE: Your Honor, I apologize. I misunderstood your question. The Under Secretary of State for Policy --

THE COURT: I didn't ask you about the Under Secretary of State. I asked you about Mr. Mobbs.

MR. GARRE: Mr. Mobbs was not, Your Honor.

THE COURT: Was Mr. Mobbs a convening authority for general court-martial jurisdiction in the military?

MR. GARRE: I don't believe he was, Your Honor.

THE COURT: Was Mr. Mobbs -- does it appear in here anywhere that Mr. Mobbs was a commissioned officer of the United States?

MR. GARRE: It doesn't appear in the affidavit, Your Honor. Mr. Mobbs has reviewed --

THE COURT: Is Mr. Mobbs an employee of the United States?

MR. GARRE: Your Honor --

THE COURT: Or is he just a special advisor hired to

take a statement?

MR. GARRE: With respect, Your Honor, the declaration states that Mr. Mobbs is an employee of the United States, that he's a special advisor.

THE COURT: No, it does not. It says he's a special advisor to the Under Secretary of Defense for Policy, doesn't it?

MR. GARRE: It does, Your Honor.

THE COURT: It doesn't say he's a GS anything, does it?

MR. GARRE: It does not say that, Your Honor. It does say he has been substantially involved in the detainee operations and is familiar with the detainee operations involving the hostilities in Afghanistan, and --

THE COURT: So he is what one would call normally an expert; is that correct?

MR. GARRE: I don't know that he's being offered as an expert in the evidentiary sense, Your Honor. What he does --

THE COURT: Well, if he was offered as an expert, at least the Court could then decide under Daubert whether to accept his testimony or not; isn't that correct?

MR. GARRE: I suppose that's correct, Your Honor, if we were in a normal civil evidentiary proceeding, which I don't think that we are.

THE COURT: This isn't a normal evidentiary proceeding because this isn't a writ of habeas corpus? Habeas corpus isn't a normal proceeding?

MR. GARRE: Your Honor, this is a habeas proceeding. I don't think Your Honor referred to the rules governing experts who -- Mr. Mobbs hasn't been submitted as an expert in accordance with the civil rules.

THE COURT: So he isn't --

MR. GARRE: What he has been submitted, Your Honor, is to provide a factual basis for the military's determination Mr. Hamdi is indeed a military combatant. He does that, Your Honor. He lays down the criteria and the considerations on which the military relied in making that determination. He explains that Mr. Hamdi surrendered with an enemy unit. He explained Mr. Hamdi laid down his AK-47 with that unit.

THE COURT: I don't find the same explanations you do. Let's read the Mobbs' Declaration. Let's go down it paragraph by paragraph, Mr. Garre.

MR. GARRE: Yes, Your Honor.

THE COURT: Not what you interpret the paragraph here, but what the paragraphs say, okay?

He says Mr. Hamdi traveled to Afghanistan, doesn't he?

MR. GARRE: He does say that, Your Honor.

THE COURT: He says in approximately July or August

of 2001.

MR. GARRE: He does say that, Your Honor.

THE COURT: He says that he remained affiliated with a Taliban unit. What does affiliation mean?

MR. GARRE: Well, I think what he also says is --

THE COURT: He didn't say he was a member. He said he was "affiliated".

MR. GARRE: I want to stick to the terms of the affidavit, as Your Honor mentioned. He says in paragraph nine Mr. Hamdi's confirmed the fact he surrendered and gave his firearm to the Northern Alliance forces.

THE COURT: So if he -- any person who was in the area who has a firearm and gave it to the Northern Alliance forces -- we'll get to paragraph nine in a minute. Can we stick with paragraph three right now?

MR. GARRE: Your Honor, I'd like to answer the Court's questions consistent with the declaration. With respect, I think it's relevant to refer to --

THE COURT: You say number nine should be read with number three?

MR. GARRE: Your Honor, I think we should read the declaration as a whole. The question before the Court is the sufficiency of the declaration, not the sufficiency of any single sentence.

THE COURT: I understand that, Mr. Garre. Thank you.

All right. Now, let me ask you this question: They talk about the Northern Alliance. The Northern Alliance does contain certain units that were Taliban units; isn't that correct?

MR. GARRE: I don't know if that's factually correct.

THE COURT: So news accounts -- well, it's not in this report. Should I consider that, news accounts of that.

MR. GARRE: Certainly the Court of Appeals asked this court to consider the sufficiency of the declaration. I want to make this clear.

THE COURT: I won't consider that because it was just in newspaper accounts, and I assume they could be incorrect.

MR. GARRE: That's fine, Your Honor. I want to be clear, though, what the declaration states.

THE COURT: What is the Taliban? What is the Taliban?

MR. GARRE: As the -- the Taliban, they are, as the declaration states in paragraph six, "Al-Qaida and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al-Qaida or Taliban --"

THE COURT: Stop at that point right now. So that's your definition of the Taliban; is that correct?

MR. GARRE: That's what the Mobbs' Declaration

states.

THE COURT: That's what this Mobbs' Declaration states?

MR. GARRE: Yes. If I could also --

THE COURT: Anybody who was in conflict with your Coalition partners is a hostile force?

MR. GARRE: Well, I think that that would be a reasonable supposition, but that's not what the declaration says. The declaration goes on to say individuals associated with al-Qaida or Taliban were and are enemy combatants based on his interviews --

THE COURT: Do you have any information in here that says -- there is nothing in here that says Mr. Hamdi was an al-Qaida.

MR. GARRE: No. No, there isn't.

THE COURT: Why is it in here then?

MR. GARRE: Excuse me, Your Honor?

THE COURT: Why is that in this Mobbs' Declaration? If there is no evidence of any kind that Hamdi was an al-Qaida, why have you mentioned that members of those forces should be considered if he's considered in the same element?

MR. GARRE: Because the hostilities in Afghanistan have focused on the al-Qaida and Taliban forces and individuals over there. That's --

THE COURT: Oh. That's why it's there, not to

connect Mr. Hamdi, but it's to show --

MR. GARRE: I have never understood the petitioners in this case to dispute that the al-Qaida or the Taliban were enemies of the nation.

THE COURT: The problem with the Taliban is that these are all warlords, are they not?

MR. GARRE: I don't know that that's factually correct, Your Honor, but it would -- that statement would conflict with at least the governmental authority that the Taliban --

THE COURT: So that all of these articles about various warlords in Afghanistan having certain units --

MR. GARRE: I think, Your Honor, you're getting to the unconventional nature of the conflict. I appreciate Your Honor's questions. There is no question that we're dealing with a foe which is unconventional, which doesn't follow the laws of the customs of war, which doesn't wear uniforms, and for those reasons, among others, aren't put into the category of traditional POWs. But the Fourth Circuit made clear --

THE COURT: I understand they're not put in the category of traditional POWs. Answer my question then. I realize that the Fourth Circuit has made some rules and regulations, and I shall follow those to the tee. Now, Mr. Garre, don't misunderstand me.

MR. GARRE: Thank you, Your Honor.

THE COURT: You have no fear.

MR. GARRE: But I did want to -- if Your Honor had a question, I did want to state that the Fourth Circuit made clear the unconventional aspects of this conflict don't make mistakes any less grave. And it's clear from the decision, I think, that the unconventional nature of this conflict didn't in any way suggest to the Court of Appeals the military's long established authority to capture and detain enemy combatants was any different in this case than a German soldier captured in the Battle of the Bulge or any other armed conflict with which this court is familiar.

THE COURT: All right. I tend to agree with that in combatants. Combatants should be treated as any person would be. In fact, there are some Army regulations pertaining to it which will have the force and effect of law; isn't that correct? Isn't that correct?

MR. GARRE: I think that there certainly are regulations that have the effect of some law. The regulations, the petitioners certainly haven't based any claims on, and the regulations --

THE COURT: I didn't ask you what the petitioners based any claims on. I'm asking you now about regulations made pursuant to the authority of the Army and Navy and joint regulations. Do they have the force and effect of law?

MR. GARRE: They certainly have some force as law.

There certainly would have to be legal debate about their effect and, more importantly, their application to this case.

THE COURT: We know, therefore, when any person who's taken into custody by the United States, that one gets his complete name, his rank, his serial number, his date of birth, his city of birth, his county of birth, his -- the name and address of next of kin, the date of capture, the place of capture, the capturing unit, the circumstances of capture, and certain other information. But all of that you have; isn't that correct, sir?

MR. GARRE: Well, I think to answer both the Court's questions, first of all, the regulations in this case -- if the Court is referring to the regulations appended to the petitioners' traverse --

THE COURT: I'm talking any persons of war, retained personnel, civilian attorneys, and other detainees under -- it's Army regulation 190-8, a joint regulation applying to all of the -- it's the Navy regulation OPNAVIONST 3461.6, Air Force AFCI 31-304, and Marine Corps MCO 3461.1.

MR. GARRE: Yes, Your Honor. If I could make a couple points addressed to those regulations.

THE COURT: All I'm asking is that regulation is followed, isn't it?

MR. GARRE: Your Honor, I'd like to explain. I'd like to give you the answer.

THE COURT: It isn't followed?

MR. GARRE: No, Your Honor. That's not correct.

THE COURT: So it was followed?

MR. GARRE: The regulations -- if I could try to explain.

THE COURT: I will allow you to explain.

MR. GARRE: Thank you.

THE COURT: Mr. Garre, one of the things that you'll find out about me is you answer my questions, I'll allow you to explain for three hours if it's necessary, okay?

MR. GARRE: Okay.

THE COURT: But answer my questions.

MR. GARRE: Yes, Your Honor.

THE COURT: I realize that in this era of the last decade we want to make explanations, but I want answers and then explanations, okay?

MR. GARRE: Yes, Your Honor.

THE COURT: Let's go.

Then does this regulation require every person when they take a person into custody and he's supposedly in a combat situation --

MR. GARRE: That's not my understanding of the regulations. I haven't on that aspect of it --

THE COURT: Let me focus on another regulation then. This regulation says persons in the custody of the United

States Armed Forces who have not been classified as an EPW, GPW, RP, CI, shall be treated as EPWs until a legal status is ascertained by competent authority. Isn't that correct?

MR. GARRE: It is correct, Your Honor.

THE COURT: And under this regulation the competent authority would be a military tribunal if the matter is in issue; isn't that correct?

MR. GARRE: I don't think that's correct, Your Honor. I think that the competent authority would include the President of the United States, the Commander-in-Chief, and I think --

THE COURT: How about Mr. Mobbs? Is he a competent authority?

MR. GARRE: I mean, I don't think that that question arises --

THE COURT: As you offered it -- looking at this declaration, it says Mobbs did this, Mobbs decided that.

MR. GARRE: Your Honor, I apologize. I am trying to answer your question, but sometimes it requires additional information. And if I could explain the application of these regulations.

THE COURT: We're dealing with the Mobbs' Declaration in relation to law.

MR. GARRE: Your Honor --

THE COURT: That's all I can deal with.

MR. GARRE: Your Honor's asked for the government's explanation as to the application of regulations and if I could explain.

THE COURT: That's all right. Go ahead. You can explain. The regulations don't apply to the United States Navy?

MR. GARRE: Your Honor, the regulations state that persons can be provided with certain protections until their legal status is confirmed. In this case the President has determined that --

THE COURT: That does not appear that the President has determined anything. It appears that Mr. Mobbs has. I'm looking at the Mobbs' Declaration.

MR. GARRE: But, Your Honor --

THE COURT: That's all I'm considering.

MR. GARRE: Your Honor, the President has determined that members of the Taliban and the al-Qaida do not meet the definitions of POWs and, therefore, fall into the status of unlawful combatants. The Mobbs' Declaration explains --

THE COURT: Stop a minute. Do you mean to tell me that all of the people that are serving in the new Afghanistan government that were Taliban or were unlawful enemy combatants of the United States and we put them in office? Is that what you're saying?

MR. GARRE: It's not what I'm saying, Your Honor, for

this reason --

THE COURT: Well, we better -- what I'm having -- the problem I'm having, Mr. Garre, is we can't have our cake and eat it too. Either it applies or it doesn't apply.

MR. GARRE: It does not apply, Your Honor. I've tried to give the Court the reasons why it doesn't apply. It's also a quad services regulation, which is not itself binding on the Department of Defense. And it's, of course, not the basis of any claim based on petitioners. The regulations purport to apply to prisoners of war, people whose status hasn't been determined otherwise. The President has made that determination that members of the al-Qaida and Taliban are not entitled to prisoner of war status. Judge Ellis discussed that determination in his recent decision. We think the Mobbs' Declaration --

THE COURT: I read Judge Ellis' decision. In that case it was interesting. One of the factors that he utilized was the fact that -- I'm sure you're familiar with it -- that Mr. Lindh did not properly attack the problem; isn't that correct?

MR. GARRE: I'm not sure if I understand what the Court's referring to.

THE COURT: Well, let's see if I can find that opinion. In his opinion he had several factors that he applied. One of them was the ability of Lindh to contest the

matter; isn't that correct?

MR. GARRE: Well, of course, Mr. Lindh was charged with a criminal offenses which invoked constitutional rights that do not apply in this proceeding.

THE COURT: So if Hamdi were charged with a criminal offense which would cause him to be, let's say, jailed for six months or more, he would be entitled to counsel; isn't that correct?

MR. GARRE: He would be entitled to the same protections that Mr. Lindh received, and that would include counsel, yes. We don't dispute that, the application of the Sixth Amendment in this case, but we've argued in our return that the Sixth Amendment has no application by its terms or by precedent to this type of proceeding.

Now, Mr. Lindh was involved in a criminal proceeding. He pleaded guilty to aiding the Taliban and to using a weapon with the Taliban, and admitted in open court to be a Taliban soldier. That's resulted in his imprisonment for 20 years. Mr. Hamdi is being detained as an enemy combatant in connection with the current hostilities. He hasn't been charged with any criminal offense or other offense. And his detention is necessary, as we've explained, because of the purposes that combatants have always been detained: One, to prevent them from going out continuing to give aid or fight with the enemy; and two, because of the important role that intelligence

gathering has in any war effort. The government -- precisely because of the unconventional --

THE COURT: How long does it take to question a man: A year? Two years?

MR. GARRE: Your Honor, Chief Judge --

THE COURT: 10 years? A lifetime? How long?

MR. GARRE: Your Honor, Chief Judge Wilkinson put it this way at the last oral argument, and I think it's an excellent analogy: Intelligence gathering is like building a puzzle. You have to put the puzzles together. And oftentimes you don't realize with any given piece how it fits in together until there are subsequent developments or subsequent information comes to light.

We know it takes time. It takes time in the current war effort in particular because of the unconventional nature --

THE COURT: How much time, Mr. Garre? I agree with Judge Wilkinson, of course. How much time?

MR. GARRE: I can't answer that question today, and I don't think one would be able to answer that question --

THE COURT: Would you say 10 years or 20?

MR. GARRE: Your Honor, we would not be in anymore position to answer that today than we would be after 11 months after the attacks on Pearl Harbor with respect to how long a war would last, how long we need to gather intelligence. It's

not a novel situation for the government to be in to not be able to answer those questions.

THE COURT: As long as you're gathering intelligence you can keep this man in a locked cell with no windows -- he's already been there four months, five months? He can't even have a piece of paper and a pencil to write on?

MR. GARRE: Well --

THE COURT: Isn't that what you said in -- before Judge -- in the Court, according to the newspaper article?

MR. GARRE: I'm not familiar with those statements, Your Honor. They would be incorrect. I don't believe we made those -- that position.

THE COURT: Well, maybe --

MR. GARRE: Petitioners have made clear, and this is on page nine of their traverse, I think, that they're not challenging the conditions of Mr. Hamdi's confinement. I think what -- the way the Fourth Circuit characterized it, and I think it's the helpful and the correct way to do it, and that's a question of the Court whether or not Mr. Hamdi's detention --

THE COURT: Don't you think this is of some concern that a person is being held in solitary confinement in a windowless room --

MR. GARRE: Your Honor --

THE COURT: -- for four months? Is that -- incommunicado?

MR. GARRE: I don't know where the character.letter to the windowless room comes --

THE COURT: It came from a newspaper article, Mr. McCray or somebody familiar with the case.

MR. GARRE: We stated in our return that Mr. Hamdi is not in solitary confinement in the traditional sense that term is used. He happens to be the only captured enemy combatant who's currently detained at the Norfolk facility. By other laws and regulations he is separated from military personnel who are detained there. Mr. Hamdi does receive daily visits from the commander of the brig. He is able to meet with the chaplain at the brig three or four times a week. He meets with the doctor once a week. So the notion --

THE COURT: He just can't meet with a lawyer?

MR. GARRE: Well, Your Honor, again, I think that Chief Judge Wilkinson put it aptly when he mentioned during the last argument that no one would suggest that the German soldier captured at the Battle of the Bulge would be able to come back and be entitled to a right to counsel, much less --

THE COURT: I don't have any question about that, but we're not dealing with a German soldier captured at the Battle of the Bulge. We're dealing with an individual who evidently, according to your statement, was picked up in a situation in which, in reading this, he had a weapon and he was with a Taliban unit; isn't that correct?

MR. GARRE: He surrendered with a Taliban unit. It also says he went to Afghanistan --

THE COURT: What's interesting here is it says -- let's look at this paragraph. It says Northern Alliance forces were engaged in battle with the Taliban.

I have no doubts Northern Alliance forces engaged in a battle with the Taliban. It doesn't say in a battle with the Taliban unit that this man was in. It says engaged in a battle with the Taliban. That's true. The whole world knows that. Mobbs doesn't have to say that. But what he didn't say was they were engaged in a battle with this unit.

MR. GARRE: Your Honor, I think if the Court's concern is to whether or not someone who --

THE COURT: My concern is what is stated in this declaration. You have quite rightly, according to the Fourth Circuit, not given me anything evidently. And --

MR. GARRE: With respect, that's not true, Your Honor. The Mobbs' Declaration explains in detail --

THE COURT: The only thing is the Mobbs' Declaration, and, accordingly, I'm going down it piece by piece.

You know, one of the things in early life I was taught, when you're reading a letter, like a letter of reference, one reads for what is there and what is not there. It is important to determine what is left out as well as what is put in.

What is put in is Northern Alliance forces were engaged in battle with the Taliban. We know that. Hamdi's unit surrendered to Northern Alliance forces, not to any U. S. forces. He was transported with his unit from Kondur, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of Northern Alliance forces.

It was -- the next sentence is extremely interesting. Hamdi was directed to surrender his -- I can't pronounce it -- assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so.

In other words, he had his weapon after he turned himself over to Northern Alliance forces, and kept it until later. Doesn't sound much like anybody was afraid of him, does it?

MR. GARRE: Your Honor, I would disagree with that. I think if Your Honor looks at other paragraphs of the declaration, I think it is important to read it as a whole.

THE COURT: The next sentence --

MR. GARRE: The battlefield interrogation team determined that Mr. Hamdi went to train with and, if necessary, fight with the Taliban.

THE COURT: Wait a minute.

MR. GARRE: That's in paragraph five.

THE COURT: Wait a minute. Can you go down to the next paragraph?

MR. GARRE: It's the next paragraph, Your Honor, that Your Honor was reading from.

THE COURT: He identified himself as a Saudi citizen, okay?

MR. GARRE: Yes, Your Honor.

THE COURT: If he identified himself as a Saudi citizen, why was he separated from the remainder of his compatriots, whomever they may be, in Guantanamo?

MR. GARRE: He was separated first in Afghanistan because the battlefield interrogation team made the determination that he was an enemy combatant.

THE COURT: Doesn't say anything about that. Somebody made a determination.

MR. GARRE: I think it does, Your Honor. I think it says, in paragraph five, Hamdi was interviewed by a U. S. interrogation team while he was in prison in Sheberghan.

THE COURT: U. S. interrogation team?

MR. GARRE: Yes, Your Honor. A team consisting of military personnel on the ground.

THE COURT: It doesn't say that. It says a U. S. interrogation team.

MR. GARRE: Yes, Your Honor. That's what it says.

THE COURT: I assume 10 U. S. citizens could be an interrogation team, or two. It doesn't say it's any type of interrogation team. It just says a U. S. interrogation team.

MR. GARRE: It's the military forces in Afghanistan comprise that team, and that team made a determination.

THE COURT: Where does it say that in there? Does it say it in there?

MR. GARRE: Your Honor, let me then refer the Court to paragraph eight if it has concerns about whether or not that was a military unit that made that determination.

In January 2002 a detainee review and screening team established by the commander of U. S. Central Command reviewed Hamdi's record and determined that he met the criteria established by the Secretary of Defense for individuals over whom the United States forces should take control and moved to Guantanamo Bay, Cuba. The detention --

THE COURT: So he was supposed to be moved to Guantanamo Bay. He met the criteria for going to Guantanamo Bay. I don't know what that was, but I assume he met that criteria.

MR. GARRE: That's correct, Your Honor. The declaration also makes clear that the military has determined, based on interviews with Mr. Hamdi, and in light of his association with the Taliban, that Hamdi was considered by military forces to be an enemy combatant. That's --

THE COURT. Wait a minute. Where does it say that?

MR. GARRE: It says that in paragraph six, Your Honor, the last sentence of paragraph six.

THE COURT: Hamdi was considered by military forces to be an enemy combatant.

MR. GARRE: That's right. That ties right into paragraph five which refers to the U. S. interrogation team which was the military force, Your Honor.

THE COURT: It doesn't say that. It says some military force determined --

MR. GARRE: The declaration states military forces made that determination. Significantly, petitioners don't --

THE COURT: Was that the Northern Alliance military forces?

MR. GARRE: No, Your Honor. I think --

THE COURT: How would I know it wasn't?

MR. GARRE: The Northern Alliance forces --

THE COURT: It doesn't say in here it was the American military forces. It says military forces.

MR. GARRE: Your Honor --

THE COURT: Is the Northern Alliance a military force?

MR. GARRE: Your Honor, with respect --

THE COURT: You see, you won't give me any information except that information that's in this Mobbs' Declaration. You may be entirely correct, Mr. Garre. You may be absolutely correct. He may be the worst enemy any man ever had. But the problem is what you're saying is I must rely on

this and only this. If I'm to rely on only this, then I must pick it apart. Do you understand that, Mr. Garre?

MR. GARRE: I do understand that, Your Honor, and I think --

THE COURT: If you gave me the information, you know, then all of this probably could have been avoided.

MR. GARRE: Well --

THE COURT: It just doesn't make sense.

MR. GARRE: With respect, Your Honor, we think that the standard that governs the proceeding at this stage is that the military would be asked to come forward and to provide a factual basis for its determination that Mr. Hamdi is an enemy combatant. That standard has been applied in other habeas contexts which involve the review of executive determinations which are entitled to even less deference.

THE COURT: In this regulation that may or may not apply because it applies to almost all of the -- it says this: A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or is engaged in hostile activities in aid of enemy armed forces and who asserts that he or she is entitled to treatment as a prisoner of war or concerning whom any doubt of a like nature exists.

And I'm speaking of --

MR. GARRE: 1.6(b), Your Honor.

THE COURT: That's correct.

MR. GARRE: That's right. That provision doesn't apply because it's directed to individuals who are being held as and are entitled to status of POWs. It refers to Article IV of the Geneva Convention, which is --

THE COURT: You mean he's not contesting, then, I assume, that he's not an illegal enemy combatant? He's not contesting that?

MR. GARRE: I think --

THE COURT: And his statements would indicate to you that he's not contesting that? I don't have the benefit of his statements because you don't want to provide those obviously. And you don't have to. I'm not saying you do.

MR. GARRE: Mr. Hamdi is being held like the other detainees captured in connection with the hostilities in Afghanistan, not as a POW. The President has determined, and Judge Ellis explained this in his recent decision in the Lindh case --

THE COURT: If Judge Ellis were here, then he already would have decided the case. So I have anything to decide or do you want to say Judge Ellis has decided that Hamdi should be held? Why am I here? If that's the case, you know, we may not have any of these proceedings, need we?

MR. GARRE: With respect, Your Honor, we have made clear that the courts have a role in habeas proceedings of this

type. Now, part of those proceedings are going to involve the review of legal challenges. And those are the principal challenges raised by the habeas petition in this case. And if Your Honor would like, I would be happy to discuss those challenges.

Now, another part of that role is the role that the Fourth Circuit discussed in its recent decision. And that's a much more limited role involving a review of the executive's determination that an individual is an enemy combatant.

Now, the Court's limited role in that sphere follows from the separation of powers principle governing this determination and respect for the fact that the military, the Fourth Circuit has said, and the executive branch is in the best position to make these determinations, and that the Court, therefore, has a much more limited role. It doesn't mean it has no role. The Fourth Circuit suggested --

THE COURT: The interpretation, assuming that the President has made a determination, and I haven't seen that, but I assume that that will be provided at some point in time --

MR. GARRE: Well, Your Honor, with respect --

THE COURT: Don't misunderstand me. I haven't been provided that.

MR. GARRE: The relevant material set out in Judge Ellis' decision, which --

THE COURT: He said the interpretation of the President was due deference, that Lindh failed to carry his burden of demonstrating to the contrary. So Lindh had a right to demonstrate to the contrary, did he not?

MR. GARRE: In the criminal proceeding, which is not applicable here.

THE COURT: Lindh had a right to demonstrate he was not an illegal enemy combatant, did he not?

MR. GARRE: Yes, he did, Your Honor. And Lindh was entitled to other rights that are afforded --

THE COURT: And he failed to do that? Did he fail to do it?

MR. GARRE: Yes, Your Honor.

The reference to the President's decision is contained in the February press release. I would be happy to provide the Court that, if it would like. Petitioners haven't relied on that.

THE COURT: What you're saying is I can look at press releases then?

MR. GARRE: I said I would be happy to provide it.

THE COURT: Should I look at press releases?

MR. GARRE: This issue --

THE COURT: All I want to know -- I don't want to look at press releases for one side and not look at press releases for the other.

MR. GARRE: Let me try to be clear on this. We think the Court can resolve this case on the papers that are before it and that it can and should grant the government's motion to dismiss.

THE COURT: What's worrying me is the Mobbs' Declaration. I don't know who Mobbs is or was or is he a hired expert or was he hired for the purpose of making this affidavit. He may have been a person that investigated it thoroughly. He may be the most knowledgeable person. He may be a historian and know all about the history of the East and Near East. He may know about all the warlords that have been going back and forth there for centuries.

MR. GARRE: With respect, Your Honor, the Court's role here is not to conduct a Daubert type inquiry under 702.

THE COURT: I'm not going to go into a Daubert inquiry. I want to go back to this --

MR. GARRE: The question for the Court is whether or not the Mobbs' Declaration provides a factual basis for the military's determination. It does so. It explains in detail Mr. Hamdi is a classic type of enemy combatant who was captured on a foreign battlefield, surrendered, and laid down his gun, his AK-47, with an enemy unit. We think that -- there hasn't been a real dispute over whether or not someone who surrenders with an enemy unit --

THE COURT: Dispute with what? What is Hamdi

disputing? Only thing he disputes is some lawyer that is stuck by the problem of not being able to talk to him, not see any statements he made, not see anything from him, but only to look at the Mobbs' Declaration and to attack it. Isn't that all that they can do?

MR. GARRE: That's correct, and that's consistent with the Fourth Circuit's recent decision --

THE COURT: That's consistent with the Court of Appeals. I understand that.

MR. GARRE: -- and the long established authority it relied on. But it's still relevant, Your Honor, that the petitioners -- that the Court still has to look at the claims made by the petitioners in this case.

THE COURT: But, you know -- let's go back to paragraph three. As I said, Hamdi was affiliated with a Taliban military unit. It doesn't say Hamdi was a member of a Taliban military unit, does it?

MR. GARRE: It says affiliated, Your Honor. And it also says, again in paragraph five, that the interrogation team confirmed that Hamdi went to train with and, if necessary, fight for the Taliban. Persons who train with enemy units --

THE COURT: That's not in paragraph three. That's in the other paragraph.

MR. GARRE: That's true, Your Honor.

THE COURT: I'm trying to go down them number by

number. I realize it does make it a little hard for you, Mr. Garre, because I appreciate what you're doing.

Now, number --

MR. GARRE: Thank you, Your Honor.

THE COURT: In -- it does not say what military unit he was with, does it? It doesn't say what unit. It just says it was a unit.

MR. GARRE: That's right, Your Honor.

THE COURT: Okay. So in paragraph 4 Mobbs states that Hamdi was captured by Northern Alliance forces in late 2001. Now, if he investigated the record, he would know exactly when he was captured, wouldn't he, because we know from the regulation that somebody determined the date of capture, place of capture, and so forth, correct?

MR. GARRE: Your Honor, I don't know whether or not that fact is correct, and I don't think the regulation referred to is applicable to Mr. Hamdi, but, to be clear, the military has --

THE COURT: Let me say this so we understand one another from the beginning:

MR. GARRE: Yes.

THE COURT: I think the regulation pertains to the United States Armed Services, okay? As such, when the United States Armed Services got Hamdi, they had to follow the regulation. I'm not holding anything else, but that's just no

ifs, ands, or buts, okay?

MR. GARRE: I understand the Court's position on that. I think that's incorrect.

THE COURT: That's not the issue before me.

MR. GARRE: But if I could be clear, the military has -- and this was referred to in the Mobbs' Declaration reports and records. It has more information on Mr. Hamdi's capture, but it's in the military. Mr. Mobbs has reviewed the relevant information with respect to Mr. Hamdi, laid out the grounds and circumstances under which he was captured and detained and determined to be an enemy combatant. It's not for the Court to conduct a de novo proceeding.

THE COURT: I'm not trying to conduct a de novo proceeding. All I want is the papers. If I had seen the papers, we probably would have ended this a long time ago. Now I'm curious. I get more curious all the time.

MR. GARRE: But -- and --

THE COURT: And, you see -- you know, generally, generally -- not to say that the government would -- generally when people hide things you can generally assume if it were advantageous to them they wouldn't hide it, would they? Is that a fair assumption?

MR. GARRE: Your Honor, that may be a fair assumption in some circumstances, but, to be clear, that wouldn't apply here. The military has provided the basis on which it's

determined that Mr. Hamdi is an enemy combatant. Under the limited standard review that would govern here the military has come forward and provided a factual basis which would satisfy the Fourth Circuit's decision in this case and which would make clear that the present detention of Mr. Hamdi is lawful. It's not --

THE COURT: What concerned me, this statement indicates that Hamdi kept his weapon after he surrendered, for some time after. And what bothers me is that what is traded between these two sides, the Northern Alliance or group, obviously, of people that -- well, I don't want to even go into it. In any event, I don't know what distinguishes a Northern Alliance unit from a Taliban unit. There is nothing to say what distinguishes the two.

MR. GARRE: Well, Your Honor --

THE COURT: I dare say it would be hard for us to figure it out, wouldn't it, Mr. Garre?

MR. GARRE: With respect, I would disagree. As the declaration states, the Northern Alliance forces were engaged in battle with the Taliban. And that -- the Court doesn't need --

THE COURT: Doesn't say they were engaged with the Taliban that Mr. Hamdi was with. That's what's so interesting about this.

MR. GARRE: Your Honor, I think what's interesting

about this is that Mr. Hamdi associated with a Taliban unit, an enemy unit, an enemy of the United States. He surrendered his AK-47 rifle when he was captured by Northern Alliance forces, which we've explained in our papers were Coalition forces. The United States interrogation team on the battlefield -- petitioners don't challenge -- they make this very clear. Petitioners are not challenging the battlefield determination.

THE COURT: Who is not challenging?

MR. GARRE: Petitioners. The individuals here today. It's in their papers, the traverse which is before this court.

THE COURT: As far as I'm concerned, I'm only looking at the Mobbs' Declaration. I'm challenging everything in the Mobbs' Declaration. So understand that, Mr. Garre.

MR. GARRE: I appreciate that.

THE COURT: I don't know what Mr. Dunham does or doesn't do.

MR. GARRE: I appreciate that.

THE COURT: I'm going down this thing piece by piece. And if you think that I don't understand the utilization of words, you're sadly mistaken. I understand what the words mean and what they don't mean. And I think Mr. Mobbs understands the utilization of words. He is a "special advisor" as far as I can tell. I don't even know what GS rank he may have or doesn't have or whether he's just a consultant.

MR. GARRE: Your Honor, I don't know that either, but

what I do know is he has been substantially involved with the detainee operations that the United States military has been involved in with respect to the al-Qaida and the Taliban. That's in paragraph one of the declaration. I can read it to the Court.

THE COURT: You can read it. Go ahead.

MR. GARRE: In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al-Qaida terrorists and those who support and harbor them, including the Taliban. I have been involved with the detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

I think that clearly puts Mr. Mobbs in the position of someone who would be familiar with the overarching --

THE COURT: My secretary is familiar with the Hamdi case. Should she decide it?

MR. GARRE: I think what the Fourth Circuit --

THE COURT: She's a special advisor. In fact, the secretaries have gotten new titles now.

MR. GARRE: With respect, Your Honor, the question was made -- I think it was made not seriously, but --

THE COURT: I'm only reducing things to an absurdity for the purpose of emphasizing certain attributes of the Mobbs' Declaration.

MR. GARRE: We don't think that there is anything absurd about the Mobbs' Declaration or anything absurd about the government's position in this case.

THE COURT: I didn't say it was. I merely said I reduce things to an absurdity to emphasize those things that are wrong. I'm not trying to say it's absurd. And I want to make that clear. And, Mr. Garre, you know I wasn't. So be --

MR. GARRE: No, Your Honor. I appreciate that the Court was not being serious in that, but it does illustrate an important point, which is that the military is in the best position to make these judgments.

THE COURT: I didn't say the military wasn't in the best position. All I'm saying is it doesn't show in this Mobbs' Declaration that a military tribunal has acted, that a convening authority, as required by the regulation, convened a special military panel of which one of which would be composed of a member of the Judge Advocate General Corps, whether it be in the Navy, the Army, or the Marine Corps.

MR. GARRE: Your Honor --

THE COURT: They would then make a decision if it was in doubt. What you're saying is it's not in doubt, there is no question about it, except I don't know of any battle this man engaged in, I don't know of any weapon he ever fired, I don't know of anything he did, other than to be present with a Taliban unit according to them. And I assume that's correct.

But if I begin to have doubts about this, then why wouldn't the military tribunal have acted in the eight or nine months since he's been captured?

MR. GARRE: Your Honor, I've tried to explain the government's position, that those regulations the Court referred to are not applicable in this case. I understand that the Court disagrees with the government on that, but I think the Court's characterization --

THE COURT: I feel that the regulations apply. I'm not saying they don't apply. That doesn't affect his status any. It may be that they would decide he's an unlawful enemy combatant.

MR. GARRE: It doesn't affect his status. It in no way affects the determinations --

THE COURT: What worries me is nobody, nobody, seems to care what Hamdi says.

MR. GARRE: Oh, to the contrary, Your Honor. And I think, again, the Mobbs' Declaration --

THE COURT: You've picked out statements that said -- and I looked at that statement. You know, a long time ago, as I told you, they said that he stated that he entered Afghanistan to train with and, if necessary, fight for the Taliban, correct?

MR. GARRE: That's what it states, Your Honor, yes.

THE COURT: If necessary. If necessary might mean in

self-defense. It might mean a myriad of a number of things. I don't know what he said, in what context it was said.

MR. GARRE: Your Honor, I think that that's not relevant to argue the case. The view we've set out in our motion to dismiss, and so that I can try to be more clear with the Court, our position -- the military has determined that someone who goes to Afghanistan to train with an enemy unit, someone who stayed in Afghanistan after September 11th and the attacks on this nation, someone who surrendered in Afghanistan to Northern Alliance forces and surrendered his AK-47 to those forces, is an enemy combatant if the military makes that determination, and that the Mobbs' Declaration provides the Court with the substantial factual basis --

THE COURT: The military does not have to make that regulation in accordance with their regulations; is that correct?

MR. GARRE: Your Honor, I explained why we think that regulation does not apply here.

THE COURT: Well, maybe you better explain it again because I want to make sure I understand what the government's position is on the inapplicability of the regulation.

MR. GARRE: Well, first, as I said, just as a technical matter it's a quad services regulation that isn't specifically binding on the Department of Defense, and second and more --

THE COURT: Wait a minute. Do I understand that the Department of Defense is holding him prisoner and not the military? He isn't in the Navy brig?

MR. GARRE: Well --

THE COURT: What's this commander doing here, the poor fellow who you say is visiting him every day? What is he doing here as a defendant? You want only Rumsfeld as the defendant?

MR. GARRE: Rumsfeld and the commander of the brig, that's right, Your Honor. And the second --

THE COURT: I'm not sure Rumsfeld was a necessary party, but if you feel he's a necessary party --

MR. GARRE: Excuse me, Your Honor?

THE COURT: Do you feel Rumsfeld is a necessary party?

MR. GARRE: Certainly in the typical habeas cases Your Honor is well familiar, the custodian, immediate custodian -- that's right. Perhaps we should have moved for the dismissal of Mr. Rumsfeld. We, frankly, were focused on other jurisdictional issues at the outset of this investigation.

THE COURT: Looks like Rumsfeld made a decision. I dare say he doesn't know anymore about this case than he's read in the newspaper, do you?

MR. GARRE: With respect, Your Honor, I don't know

how to answer that question.

THE COURT: He may know more about it now.

MR. GARRE: The regulation -- if I could try to answer the Court's question on the regulations, the regulations apply -- this is in 15 General Protection Policy, U. S. policy relative to the treatment of EPW, CL, and RP, in the custody of U. S. Armed Forces is as follows: Now, the EPW doesn't refer to people like Mr. Hamdi. EPW refers to prisoner of war. The CI --

THE COURT: You know what's interesting to me, because you're depending upon prisoner of war in accordance with the regulation; is that correct?

MR. GARRE: Well, the regulations are --

THE COURT: You --

MR. GARRE: Yes.

THE COURT: The only prisoners of war are in accordance with the regulation?

MR. GARRE: The regulation is addressed -- it states in the regulation to those that meets the --

THE COURT: Mr. Garre, I have to fight for it. Are you contending that the only prisoners of war are those who are prisoners in accordance with the prisoner of war designation in the regulation?

MR. GARRE: I'm not sure. I want to answer the Court's question, but I'm not sure I understand it. What I am

contending --

THE COURT: Maybe I'll repeat it again.

MR. GARRE: Okay.

THE COURT: Do you contend that the regulation defines prisoners of war and that only those people as such defined in the regulation are prisoners of war?

MR. GARRE: Yes.

THE COURT: All right.

MR. GARRE: In the definition as contained in the regulation.

THE COURT: So everybody else is not a prisoner of war. They're a prisoner of what?

MR. GARRE: They may be another detainee or they may be a combatant. Your Honor, this is spelled out in the regulations. It's consistent with the Geneva Convention.

THE COURT: Let me ask about the customs of war. Forget the regulation. He isn't a prisoner of war under the regulation so far as you're concerned, so let's deal with something else.

Are there any customs of war?

MR. GARRE: Well, is Your Honor referring to the Geneva Convention?

THE COURT: I'm not worried -- I haven't raised the Geneva Convention. I didn't even say the Geneva Convention applies. As far as I know, Afghanistan didn't sign the Geneva

Convention. If we apply the Geneva Convention, we're in pretty bad shape. Let's go ahead. Because Hamdi is entitled to a lot of things if he were a prisoner of war under the Geneva Convention. I'm only talking to Army regulations -- Navy regulations that pertain to people who may be custodians, okay?

Now, let's go into the customs of war. Customs of war. If you take a prisoner in battle and in the customs of war they were a prisoner of war, is that correct, not under the regulations?

MR. GARRE: I think, Your Honor --

THE COURT: I'm talking about customs of war.

MR. GARRE: The Quirin case resolved that where it talks about --

THE COURT: Who?

MR. GARRE: The Quirin case, the Supreme Court case, 317 U.S. 1.

THE COURT: They weren't -- they were spies. They landed on foreign territory in -- and not in uniforms but in civilian clothes.

MR. GARRE: That's true about the saboteurs.

THE COURT: They talk about combatants. They talk about belligerents.

MR. GARRE: You know, that raises an important point about why the determination has been made that members of the -- or people like Mr. Hamdi, al-Qaida and Taliban

detainees, have not been determined to be prisoners of war under the Geneva Convention or customs of law, because they don't fight with uniforms, they don't follow the laws and customs of war.

THE COURT: Stop. Where does it say he didn't have a uniform in the Mobbs' Declaration?

MR. GARRE: I'm referring --

THE COURT: In the Mobbs' Declaration does it say --

MR. GARRE: It didn't say that, Your Honor.

THE COURT: In the Mobbs' Declaration where did it say he was not a member of an organized unit?

MR. GARRE: It does not say that. He surrendered and went to train to fight with the Taliban unit.

THE COURT: Am I to assume that it was commanded by someone if it's a unit, or can I not assume that? You see, the real problem, Mr. Garre, is when you're deciding something only, only, on a declaration, then, unfortunately, the declaration has to be very thorough.

MR. GARRE: I appreciate Your Honor's effort to --

THE COURT: I can't do a thing other than look at this declaration. And if I look at the declaration, then I find that there are certain omissions that seem substantial.

MR. GARRE: Your Honor, I appreciate your efforts to look at the Mobbs' Declaration. And I do think it's fair to say that any good lawyer, and particularly any good judge,

would be able to go through a declaration and find the sorts of things that Your Honor has pointed to today. What we do think -- and if I could be clear about the government's position -- is that the declaration has to be read as a whole, and the declaration in this case which explains the grounds and circumstances underlying Mr. Hamdi's capture, his surrender, the reasons why he went to Afghanistan, and the military's determination --

THE COURT: I don't have any doubts he had a firearm. I don't have any doubts he went to Afghanistan to be with the Taliban. I don't have any doubts of either of those things, Mr. Garre. If that is sufficient, if that is sufficient, alone, standing alone, to put him in a cell without windows for six months or 10 months or four months or whatever it is, then so be it. I have some real doubts about that.

Let me hear from Mr. Dunham.

MR. GARRE: Thank you, Your Honor.

THE COURT: Because that's really where we are.

Mr. Dunham.

MR. DUNHAM: Excuse me one second, Your Honor.

Your Honor, we have problems with the Mobbs' Declaration as being the be all and the end all of how this case should be decided. In fact, we believe that the writ of habeas corpus, you might as well just toss it out the window if somebody like Mr. Mobbs --

THE COURT: I can't decide that, Mr. Dunham. The Court of Appeals has already ruled that the only thing I can consider before proceeding any further is whether the Mobbs' Declaration is sufficient. If the Mobbs' Declaration is sufficient, Mr. Dunham, then there is no writ of habeas corpus in this case.

MR. DUNHAM: That's correct, Your Honor.

THE COURT: That's what the Court of Appeals has held.

MR. DUNHAM: That's right. But what the Court of Appeals also held was that Mr. Hamdi was entitled to meaningful judicial review. They clearly said that in the opinion. And I do not believe that you can give meaningful judicial review on the basis of the Mobbs' Declaration alone because it raises more questions than it answers.

The Mobbs' Declaration, for example, it does not say that Mr. Hamdi was an unlawful combatant. I mean, we keep getting explanations for why the regulations don't apply to Mr. Hamdi. The reason why the quad military regulations that Your Honor has been talking about, they don't apply, Mr. Garre says, because Mr. Hamdi is an unlawful combatant.

Now, to me, that's a glaring omission from the Mobbs' Declaration. It doesn't say anything about unlawful. It says he was an enemy combatant. Now, that's not why -- that doesn't square with the conditions under which he's being held. He's

being held in a military brig in Norfolk. He's being held in solitary confinement. He's being punished. He's not being held like an enemy soldier. Back in 1890 the --

THE COURT: At least he can bring a 1983 action against the person, I assume, or at least a constitutional action for lack of due process, but we're not concerned with the lack of due process here. We're concerned with the Mobbs' Declaration.

MR. DUNHAM: I think we are concerned with whether or not Mr. Hamdi is truly being held as an enemy combatant, because I think he's being held as something else. I think that the Court can infer from the fact that the government's not following its clearly printed regulations with how you should treat somebody like Mr. Hamdi as the fact that that's not why they're holding him.

Now, we look at the -- we look -- because the question is whether the Mobbs' Declaration is adequate to determine why Mr. Hamdi is being held.

THE COURT: Assuming the Mobbs' Declaration is inadequate, shouldn't the government be given an opportunity to have a convening authority convene the appropriate military tribunal?

MR. DUNHAM: Well, I will -- first off, I believe the regulations -- yes. I believe the appropriate tribunal, yes. Whether the word military goes in front of it or not I might

question.

THE COURT: The regulation says, doesn't it, that a convening authority, that is a general court-martial convening authority, which would indicate a flag officer in the Navy, would have to convene such a tribunal?

MR. DUNHAM: The President has determined in this particular situation that you don't use military tribunals for U. S. citizens. That's why they charged John Walker Lindh with a --

THE COURT: So he is not entitled, but that doesn't make any difference what the President has said if the regulation requires it, Mr. Dunham.

MR. DUNHAM: The regulation requires that the man be treated as a prisoner of war unless a military tribunal determines otherwise.

THE COURT: That's correct.

MR. DUNHAM: That regulation is not just some military regulation that doesn't bind the Department of Defense. That is our government's attempt to comply with the requirements of the Geneva Convention which requires precisely that before you treat somebody as an unlawful combatant you must have some type of process, such as -- by an appropriate authority, such as a military tribunal, to treat somebody as an unlawful combatant.

Now, you can't separate that out from the fact that

Mr. Mobbs' Declaration -- Mr. Mobbs tries to tell the Court that we are still engaged in hostility with the Taliban.

THE COURT: Well, the question there is the President has declared the national emergency with the Taliban over; is that correct?

MR. DUNHAM: That's correct.

THE COURT: Now we understand that. But the question, really, is that there was a reservation in that declaration, too, was there not?

MR. DUNHAM: That's correct, with regard to al-Qaida. It's not a declaration with regard to -- they haven't established in the Mobbs' Declaration that Mr. Hamdi falls into that exception.

THE COURT: Well, he's not a member of the al-Qaida. They just throw the words in there because it helps them. It looks good.

MR. DUNHAM: So the point I'm making is that Mr. Hamdi is currently being held as if he were an unlawful combatant without having been given any of the benefits of the regulations for that determination and without any statement in the Mobbs' Declaration that he is an unlawful combatant. If he is merely an enemy combatant and that's all he is, he should be released because the hostilities with the government of Afghanistan have ended. And under all the laws of war when the hostilities end the prisoners are released. That's

international law.

And we believe that if the government wants to stand here and say, Your Honor, we're not going to give you anything but the Mobbs' Declaration --

THE COURT: Well, that's what they said, isn't it?

MR. DUNHAM: -- we will rise or fall on that declaration, well, I say that if they do that we should get our writ granted today and we should walk over to the brig and get Mr. Hamdi because that declaration doesn't justify his detention.

Now, I am -- I do not understand -- this is one of the things I do not understand. They talk about Judge Ellis' decision in the Walker Lindh case. They don't bother to tell this case -- that in the Walker Lindh case Judge Ellis had access to statements by Mr. Hamdi, statements that they have not provided to this court. Judge Ellis determined that those statements were exculpatory to Mr. Lindh on the enemy combatant theory, whether or not Lindh was an enemy combatant, and he released those statements to Walker Lindh's private attorneys. But for some reason this court can't have them. They're not even classified. I can't figure out -- I mean, I can understand an argument -- I can understand it. I don't agree with it.

THE COURT: That's unclassified?

MR. DUNHAM: It's unclassified. My declaration is in

the file to that effect.

THE COURT: I saw that. It said it was not classified. How did you find out they were not classified?

MR. DUNHAM: Well, because when they had the hearing as to whether or not they could see Hamdi -- Hamdi must be the most popular guy I know because everybody wants to see him.

THE COURT: Well, that's good he's out there. At least according to at least the newspaper report -- I haven't looked at his cell -- he doesn't have a window in that cell.

MR. DUNHAM: But the --

THE COURT: That's according to the newspaper.

MR. DUNHAM: They wanted to see him. Of course, when they got these exculpatory statements they wanted to go see him because they thought he might be a good witness to call at their trial. Judge Ellis told them, well, you've got to check with Dunham, Dunham is Hamdi's lawyer, he'll get you in to see him. Well, big deal, I can't even see him. But the bottom line is that's what Judge Ellis told them.

THE COURT: They could have seen him because Walker Lindh was charged with something. Now, Hamdi is not charged with anything.

MR. DUNHAM: No, but he was --

THE COURT: Because if he was charged with something, you know, he'd have to be brought before a magistrate, and probable cause would have to be utilized within -- according to

the Supreme Court of the United States, within 48 hours. So we know they can't charge him now with something.

MR. DUNHAM: That's correct.

THE COURT: So it's been -- I would dare say that this length of time -- we know the decisions of the Supreme Court. They even set down a time limit for charging someone after they've taken them into custody.

MR. DUNHAM: Well --

THE COURT: But maybe it doesn't apply to the military. Maybe they could charge him. I would doubt the Supreme Court would let them hold somebody eight months or more without charging someone with something.

MR. DUNHAM: The only point I'm making, Your Honor, is that the government has more information about this situation than they have chosen to provide to the Court or to counsel for Mr. Hamdi, and that, to me, it's a very risky proposition, if they seriously want to hold this man, to come in here with an affidavit or a declaration that's as flawed as this Mobbs' Declaration is, omitting as many facts as it omits.

Just the colloquy between Your Honor and Mr. Garre shows the -- a number of deficiencies in this document, including the very basic factors of the date on which he was captured. I mean, that could be very significant in deciding legal rights. I mean, this says late in 2001. What does late in 2001 mean? Does that mean October 1st, December 31st? Why

do we have to guess as to when he was captured? All of these things as to the regulation are supposed to be taken down, unless maybe he's an unlawful combatant and the regulation doesn't apply to him. Mr. Mobbs doesn't say he's an unlawful combatant. Because Mr. Mobbs doesn't say he's an unlawful combatant and you're limited to the Mobbs' Declaration, you have to assume that he's a lawful combatant. And, yet, we are confronted with a detention in Norfolk, which is another dog that doesn't bark.

THE COURT: If you had to say he was a lawful combatant, it's obvious that they're not complying with the requirements of the Geneva Convention. But the Geneva Convention really doesn't apply to him. They wouldn't be complying with the regulations, which the Geneva Convention requires him to stay with the people of his own --

MR. DUNHAM: The other dog that doesn't bark in the Mobbs' Declaration is it doesn't explain why he's moved to Norfolk. Why is he separated from his unit? Why is he flown to Dulles Airport?

THE COURT: I assume they say this does indicate something about intelligence.

MR. DUNHAM: Doesn't say anything about intelligence. Since May we have been hearing about the intelligence value of Mr. Hamdi. I can't see him because it will interfere with the intelligence gathering operation that's going on. But, yet,

Mobbs doesn't say anything about intelligence gathering.

THE COURT: Well, Mr. Dunham, you know, it does take time to process intelligence, does it not?

MR. DUNHAM: Well, just as Justice --

THE COURT: They can keep him in solitary long enough maybe they can promise to get him out of solitary if he tells them what they want to hear.

MR. DUNHAM: Just as Mr. Garre quoted during Chief Judge Wilkinson during oral argument, I would like to quote from Justice Douglas in a concurring opinion in the United States v. United States District Court where it says that the government's desire to fortify its intelligence collage does not justify the extension of the detention of an American citizen.

And just holding him for intelligence reasons doesn't square. But, more importantly, we're here to talk about the Mobbs' Declaration. And Mobbs doesn't say he's in the Norfolk brig for intelligence gathering purposes. In fact, what is curious to me, and I agree with Your Honor's observation completely, that sometimes a declaration like that, it speaks louder for the things it doesn't say than the things that it does say. And I can't help but scratch my head and say we're challenging -- we filed this writ of habeas corpus because Mr. Hamdi was in the Navy brig in Norfolk and we thought he was going to be charged with a federal offense and they were just

holding him there. So we filed the petition for writ of habeas corpus. He's in the Navy brig. That's the detention we're challenging.

If that's the detention, Mr. Mobbs never chooses to discuss. He never says why he's there, why he's being held there, what terms or conditions he's being held under. And, yet, that is the detention that's before this court, not what happened on the battlefield in Afghanistan, not what happened when they moved him to Guantanamo. The detention we're hoping you're trying to focus on is why is he in the Navy brig in Norfolk. That's the question we ask. We have seen press reports, and I guess, you know, they have been alluded to, but we've seen press reports that talk about the fact that he was brought here to prosecute him. They brought him to Dulles Airport. They were going to bring him to the Eastern District of Virginia to Alexandria, but, oh, somebody in the Justice Department didn't want him, so they sent him down here to the Navy brig. Well, that's just press. Maybe you can't believe this. But you would think that Mr. Mobbs in explaining the detention of Mr. Hamdi in Norfolk would at least mention Norfolk somewhere in his declaration. He doesn't have a word about it. And, to me, that speaks louder than anything else.

Now, when they brought Mr. Hamdi to Norfolk they brought a bunch of other problems because they have to address 18 U.S.C. 4001(a). Now, Mr. Mobbs never explains in his

declaration why that general statute doesn't apply in this case.

THE COURT: Well, it certainly says that he has to have a trial, doesn't it?

MR. DUNHAM: It says he has to have a trial. It says in the -- and the Supreme Court has talked about that statute. Granted, that they spoke of it in dicta, but in Howe v. Smith in the ABA report -- the ABA has just come out with a report cautioning courts to handle these proceedings with care.

THE COURT: I read the -- you-all gave me all this stuff. You keep me awake all night reading this stuff, Mr. Dunham, I tell you.

MR. DUNHAM: The ABA report quotes Justice Burger as saying 4001, the plain language of 4001(a) prescribes detention -- proscribes detention for any kind of -- of any kind -- proscribes detention of any kind by the United States absent a congressional grant of authority to detain.

Now, Mr. Mobbs' Declaration does not explain -- that wouldn't apply to Mr. Hamdi if he was in Afghanistan.

THE COURT: It wouldn't apply to Mr. Hamdi if he was in Guantanamo.

MR. DUNHAM: It wouldn't apply to Mr. Hamdi if he was in Guantanamo. But when they bring him to Norfolk it applies. Now, they had to know that when they brought him here. And the government's presumed to know what the law is. And there's got

to be some reason why they think it doesn't apply or why they don't have to honor that, and it ought to be in the Mobbs' Declaration because we're talking about his detention in Norfolk, not what happened elsewhere.

I mean, how can you question the sergeant on the battlefield when there is still smoke coming out of the barrels and he's wrapping up a gaggle of guys? You know, by the time you get removed from that situation, and there's been some sorting out, and there's been some reports, and there's been some screening, and there's been some determinations made, by the time you get to that point you've got a lot of information, and you ought to be willing to share it with the judge in a habeas corpus proceeding; otherwise, the whole proceeding is a sham. To say, oh, whoa, the courts are open for habeas corpus --

THE COURT: You'll have to argue that before the Court of Appeals, Mr. Dunham. As far as I'm concerned here today, the Court of Appeals has said I have to determine if the Mobbs' Declaration is sufficient. I realize that you consider the habeas should have certain rights, a person in this proceeding; however, we're concerned with the sufficiency of the Mobbs' Declaration.

MR. DUNHAM: I understand, Your Honor.

THE COURT: You can argue that. You can go to the Supreme Court, and they'll tell you you have a right to speak

to him.

MR. DUNHAM: Well, I think that --

THE COURT: I can't do anything about that. I am interested in the Mobbs' Declaration, Mr. Dunham.

MR. DUNHAM: I will point out --

THE COURT: It's interesting to me because in reading -- I assume it was Mr. Saltzburg who was a professor at the University of Virginia before he was a professor at GW had a great deal to do with writing that brief. How it got filed here is interesting, but you-all filed it, and I took the time to read it. It is interesting because the Geneva Convention does say if there is a doubt about the status of an individual he should be before a competent tribunal, which is what the Army regulation or the Navy regulation -- it's interesting here, also, that this was not an engagement in which any Americans were involved in any capture or in any battle, if there was a battle. We don't know if he was in any battle. May not have been in any battle at all.

MR. DUNHAM: There is nothing in the Mobbs' Declaration to indicate that he fought anyone.

THE COURT: That's correct. There is not -- there is an indication that he had a weapon.

MR. DUNHAM: That's right. Indication he had a weapon.

THE COURT: The oddity is that one of the problems

that I see that's tantamount in anything is to understand what it is that is considered on each side. How do the Northern Alliance distinguish themselves from the Taliban? How can the Taliban distinguish themselves from the Northern Alliance? Are there distinguishing characteristics so that they know who they're shooting at if they're shooting at each other? And how is it that they change sides so often?

MR. DUNHAM: That --

THE COURT: All of those questions are questions that have been raised by the press and certain other people concerning -- and it creates real problems in my mind. But you're quite correct, there is nothing in here that says he's an unlawful combatant. They never said that.

MR. DUNHAM: And there is nothing in there that says --

THE COURT: What worries me is there is nothing to say that he was ever involved with any U. S. people.

MR. DUNHAM: There is nothing to say that he was even -- that he even fought anybody. Nobody provides us a definition of the term enemy combatant. It's thrown around by everybody.

THE COURT: Well, in Quirin they didn't battle anyone. They just came ashore prepared to do so. And, Mr. Dunham, you have to understand that, because in Quirin they were captured prior to the time when they had an opportunity to

battle. Here the thing that worries me is the "if necessary" he would fight. I didn't know why or what would be, in his opinion, necessary.

In any event, you continue. I've interrupted you, Mr. Dunham.

MR. DUNHAM: The enemy combatant designation in my view --

THE COURT: That makes him a prisoner of war is what you're saying?

MR. DUNHAM: That's right. The regulations talk about the fact that, hey, if you don't know what he is, before you can make him an unlawful you've got to give him a tribunal.

THE COURT: That's right.

MR. DUNHAM: Whether he's a civilian detainee or whatever he is, you can't treat him less than as a prisoner of war without giving him the benefit of that process, which hasn't been done here.

THE COURT: Now, what is the effect of the Geneva Convention to non-signers of the Convention?

MR. DUNHAM: Afghanistan is a signer of the Convention, and the Taliban was the lawful government of Afghanistan.

THE COURT: Well, now, that is a serious question, isn't it, Mr. Dunham?

MR. DUNHAM: Let me --

THE COURT: The government that was recognized by the United States was not the Taliban; is that correct?

MR. DUNHAM: Well, when the conflict began the Taliban was the governing party of the -- governing body of Afghanistan and was recognized internationally as the government of that country. We replaced that government in December of 2001 and installed a new government, which we have recognized and which we have gone so far to say we are at peace with, and which we have gone so far as to remove regulations on the books declaring a state of emergency with that government. And that government has members of the Taliban in it.

THE COURT: Well, it does. I know it does. And that creates a lot of problems because, knowing the history of the area, and realizing what warlords were doing, and realizing that pillage and plunder is a means of -- economic means of success in the East and has been for centuries -- it's nothing that's new to history. Any student of the Near Eastern history can tell you that pillage and plunder were constant utilizations by various leaders of one kind or another, sometimes under certain religious aspects or certain sets of certain religions in order to pillage and plunder. And these warlords would collect tribute. That's what it was all about.

MR. DUNHAM: That's why the Mobbs' Declaration is further inadequate, because it does not answer the very specific question that the Court asked when we were here last.

This court asked the question lastly, with whom is the war I would suggest that we're fighting? Is it with the government of Afghanistan?

Now, nobody answers that question. Mobbs certainly doesn't answer it. There are a myriad of public statements by the President that would allow this court to draw conclusion as to what -- whether we're still at war with the government of Afghanistan or not. But I think that even if --

THE COURT: We're certainly not at war with the present government of Afghanistan, Mr. Dunham.

MR. DUNHAM: We threw out one government, and there is a new government.

THE COURT: To the victor belongs the spoils. That's what plunder is about, isn't it? Pillage and plunder. To the strong -- the strong take over the weak.

MR. DUNHAM: But when you take over, the conflict is over. You don't keep holding --

THE COURT: Well, the conflict isn't over because the weak wants to reassemble and remove the strong, and maybe they will get strong again. That's what they have been doing for, what, 1,000 years, 2,000 years, 5,000 years?

MR. DUNHAM: Isn't that all internal to Afghanistan at that point?

THE COURT: No, it isn't.

MR. DUNHAM: What you have is in order for the United

States to hold somebody as an enemy combatant there has to be an international conflict in which the U. S. is involved.

THE COURT: Does it have to be an enemy of the United States? That's the question, Mr. Dunham. Or is it an enemy of some other -- I mean, if you're the enemy of my enemy, are you my -- if you're the enemy of my friend, are you my enemy? I guess you are.

MR. DUNHAM: You know, I can't get into that, but at least it would seem to me you have to do something, not just intend to do something, that you have to actually do something. And I'm not sure that the government has any -- there is nothing in the Mobbs' Declaration that indicates that Mr. Hamdi did anything other than go to Afghanistan to fight, if necessary. And I think that the failure of the Mobbs' Declaration to say that Mr. Hamdi was an actual combatant, actually took place in combatant activities --

THE COURT: There is no indication that he actually --

MR. DUNHAM: Nothing in there.

THE COURT: And if there were, he probably would have been tried by now, had an opportunity to counsel, and do all those things, but he didn't, so they're not trying him for that. They just want to keep him there for intelligence purposes, I gather, but that doesn't -- you're right, it doesn't say so in the Mobbs' Declaration, does it?

MR. DUNHAM: No, Your Honor. I go back to the fact if we didn't have an international conflict with Afghanistan you wouldn't be able to have -- to invoke the rules of war which the government invokes as its right to hold people as enemy combatants. In other words, the existence of a state of --

THE COURT: What you're really not getting to, Mr. Dunham, is anyone who is considered to be a terrorist, then, is an enemy combatant, so if you are a terrorist you're an enemy combatant, are you not, because that's who -- that's what the regulation said against enemy -- groups or individuals, so doesn't make much difference. If the man next door to you is an enemy combatant and they say he's an unlawful enemy combatant, maybe the military, the President, or Mr. Mobbs could figure out if he's an enemy combatant.

MR. DUNHAM: That's what's scary.

THE COURT: Maybe we could eliminate all these guns in the areas. Just say they're enemy combatants.

MR. DUNHAM: If you had a gun and you had an intent, you're an enemy combatant, you don't need a trial. We just lock you up forever. That's the concern here.

THE COURT: We're not going to lock anybody up forever in this country. This question here is really this man was in a fighting situation, Mr. Dunham. He was where the fight was. And that's a real problem.

MR. DUNHAM: That's correct.

THE COURT: If he had a weapon where the fight was, they certainly have a right to corral him. What worried me more about this case than anything else is they were corralled not by U. S. forces. He was corralled by these groups of people who comprise what they call the "Northern Alliance", which is really a group of various leaders or what one would normally term sort of a lord of a certain area. You know, feudalism existed well into the century in the Ottoman Empire, so that there were these various sort of fiefdoms. And it was strong people that were able to create these fiefdoms. There isn't any question about it. And they fight one another constantly and have constantly. What worries me is he happened to be in one of these fiefdoms.

MR. DUNHAM: Well, what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured. And as Your Honor has pointed out, he was allowed to keep his weapon. That doesn't sound like much of a capture to me. It almost sounds like a potential changing of alliances or whatever. We don't know what happened. And I'm sure the U. S. government knows what happened, but they haven't chose to present it to the Court. And that's further part of the problem. They're asking the Court to deny the petition for writ of habeas corpus on basically guesswork. They're asking

the Court to guess and fill in the blanks in the Mobbs' Declaration without providing the information that would make the Court feel comfortable in acting.

For that reason we believe the declaration is not adequate. We recognize that the government probably should be granted time to submit additional information because of the way the Court of Appeals suggested the Court should proceed, but were we here for final argument on this case and there was to be -- everybody had had a chance to put into the record the evidence they wanted to put into the record, I would submit that the current record is not adequate to justify the detention here.

THE COURT: Thank you, Mr. Dunham.

All right, Mr. Garre. You've heard Mr. Dunham's argument. Tell me what your reply is to his argument.

MR. GARRE: Thank you, Your Honor.

First, I want to be clear that the government's position is that someone who surrenders with an enemy unit and turns over his AK-47 to the forces that capture him is an enemy combatant, that that person doesn't need to actually fire his weapon at anyone, at his captors. He certainly doesn't have to fire his weapon at United States soldiers in Afghanistan in order to meet that definition.

THE COURT: He was there to fight. And that's correct. My problem was -- I am having a little problem with

that, but I may -- it may be sufficient. It may not be sufficient.

Mr. Garre, what is concerning me are certain things he said. There is nothing that Mr. Dunham raised, which are excellent points, and there is nothing in here to say he was an unlawful enemy combatant.

MR. GARRE: With respect, Your Honor, we think under the some evidence standard we have explained in our motion to dismiss that applies here, which is that the military has to provide a factual basis for its determination that Mr. Hamdi is an enemy combatant, that this declaration meets that standard. And we think that although Mr. Dunham tries very hard --

THE COURT: You have to describe the standard. You offered it to the Fourth Circuit, but they said no.

MR. GARRE: Maybe I'm not making myself clear, Your Honor. In our motion to dismiss we explained that a court in this certain situation applying a factual inquiry into the government's designation could look only to whether or not the government -- the executive has supplied some basis, some evidence of factual --

THE COURT: All they have to do is say he's an unlawful combatant, and that's the end of it. Is that it, Mr. Dunham?

MR. GARRE: That certainly wouldn't be a fair characterization.

THE COURT: They said he was an enemy combatant. They haven't said he's unlawful.

MR. GARRE: The Mobbs' Declaration, it provides the grounds and circumstances. I think it's important to focus, as Your Honor did earlier --

THE COURT: Where does the Mobbs' Declaration show he was an unlawful combatant?

MR. GARRE: First, as we said, and this was at page eight, note five of our motion to dismiss, whether Mr. Hamdi is an unlawful or a lawful combatant, enemy combatant, is not relevant to the military's authority to hold him. The Quirin --

THE COURT: So number one, you can hold a prisoner of war. If he's a lawful combatant, then he's a prisoner of war; is that correct?

MR. GARRE: That certainly is correct, Your Honor. And the Quirin case makes that quite clear when it distinguishes between lawful and unlawful combatants and the authority of the captors in both situations to detain those persons whether they're regarded as lawful, unlawful. The Fourth Circuit decision in this case also makes clear if indeed Mr. Hamdi is an enemy combatant who was captured during the hostilities in Afghanistan then his present detention is lawful.

Now, the bulk of Mr. Dunham's submissions --

THE COURT: The Court of Appeals has already ruled, so I don't have to do anything; is that correct?

MR. GARRE: No, Your Honor.

THE COURT: Is that your position? Is that your position?

MR. GARRE: No, Your Honor.

THE COURT: They will tell Mr. Dunham take it to the Supreme Court.

MR. GARRE: It's not. I think I wanted to make clear a number of the arguments Mr. Dunham was making here today are legal arguments that are rejected by, if not just simply flatly inconsistent with, the Court of Appeals ruling, which is well supported by other precedents that we cited in our motion to dismiss.

THE COURT: It's interesting to me, Mr. Garre, because I tried valiantly, valiantly, to find a case of any kind in any court in which a lawyer was not entitled to consult with his client. I must tell you this case sets the most interesting precedent in relation to that that has ever existed in Anglo-American jurisprudence since the days of the Star Chamber.

MR. GARRE: Well, with respect, Your Honor, we would disagree with that characterization. Again, to go back to the comment that Chief Judge Wilkinson made during the argument in the Court of Appeals case which recognizes since time

immemorial those captured in warfare have been detained without charges and without counsel --

THE COURT: I'm not questioning any capture in warfare, nor am I questioning that at all. Mr. Dunham has raised an interesting point, a very interesting point. He says a person was brought here ostensibly to be tried in this court, or in Alexandria at least, in the Eastern District of Virginia, for whatever they wanted to try him for, because he was an American citizen. He obviously is not being kept with the other combatants, which is required both by the regulation and the Geneva Convention -- there is no question about that -- which would require him to be kept with other people of similar import.

MR. GARRE: But, Your Honor --

THE COURT: He raised the point about why was he brought to the Navy brig in Norfolk.

MR. GARRE: The logic of that conclusion -- the logic of that argument leads to the conclusion that can't -- with respect, we don't think that can be right that the military can capture and detain combatants on the battlefield. Once it's done that during a period of active and ongoing hostilities it can't bring those combatants back to American soil as it did in the case of thousands of individuals during World War II, that the military -- the law prevents the military from holding individuals at other facilities that might be safer for the

United States military or that might be more conducive to other aspects of the war effort.

THE COURT: What's unsafe about this fellow they have to keep him incommunicado, in solitary confinement, other than the fact that he happened to have been born in the United States? Is he being punished because he was born in the United States? Is that why he's -- listen. I think it's punishment. The Supreme Court thinks isolation is punishment also. They've had decision after decision. Of course, you can keep people in isolation. You can give them some due process. They're entitled to some hearing. You put them in isolation because of disciplinary matters or there is an administration reason for keeping them in isolation or they may be trying to escape or many other things. You can keep them in isolation.

How long you can keep them in isolation, all of these factors begin to weigh. Does a court -- shouldn't a court take notice of that? You say they didn't raise the questions of that. But is that --

MR. GARRE: They have, as I understand it -- and I'm reading from their traverse, which says that they are not challenging the conditions of Mr. Hamdi's confinement. We don't think -- and we've explained this in our return to Your Honor's questions about the alleged fact he was held in solitary confinement. As I tried to explain earlier, he's not being held in solitary confinement in the sense that that term

is traditionally used.

THE COURT: What is solitary confinement in your sense? Does it mean that you can speak with -- solitary confinement, do you speak with your captor?

MR. GARRE: Well --

THE COURT: I mean, what is it? What do you say, he's not being kept --

MR. GARRE: Mr. Hamdi now is the only enemy combatant --

THE COURT: From a standpoint of something that's brought to the Court's attention, that concerns me in relation to the real problem of due process of a person in custody who is unable to communicate with the world.

MR. GARRE: The government's position, and we've stated this and tried to make it clear in a motion to dismiss, is that its detention of Mr. Hamdi as a captured enemy combatant is lawful whether Mr. Hamdi was in Afghanistan, whether Mr. Hamdi was in Guantanamo, or whether he's in the Norfolk Naval Brig. The military made the determination to move Mr. Hamdi to the naval brig. He happens to be the only enemy combatant at that facility.

THE COURT: So, therefore, he can be held --

MR. GARRE: He is not -- as I said, he receives visits.

THE COURT: You have another one down in South

Carolina. Why did you move that fellow down to South Carolina and Hamdi here, so they couldn't talk to one another and thereby be some intelligence problem; is that correct?

MR. GARRE: Your Honor, I'm not in a factual position to answer that question. The military made that determination. It may have been based on the different facilities under --

THE COURT: Did the military make it or did the Department of Justice make it?

MR. GARRE: My understanding is the military made that determination. As I said, I'm not in a factual basis to provide anymore information on that, nor do I think it's relevant to the habeas proceeding in this case.

THE COURT: I must admit it is not really relevant to the habeas proceeding except that an individual is being held incommunicado for a number of months, and the Court is ever mindful of that, and then the intelligence one receives from that has been held -- you know, one of the major problems -- I don't want to go into that.

MR. GARRE: Your Honor, if I could address another statement that Mr. Dunham --

THE COURT: I think fundamental fairness to people says we are not treating you as an animal, we are treating you as a person, we don't have you in a cage, we allow you to communicate. People are social by nature, aren't they?

MR. GARRE: Mr. Hamdi, as I said earlier, receives

visits every day from the commanding officer. He meets several times a week with the chaplain at the facility. He meets with the doctor every week.

THE COURT: Is he a Christian or what is he?

MR. GARRE: Your Honor, I don't know the answer to that question.

THE COURT: Is the chaplain a Mohammed chaplain or Christian chaplain? Is he -- I don't know what Hamdi is. All I know --

MR. GARRE: If the Court's concern is about personal contact, I think it's the fact of the contact that's significant.

THE COURT: So personal contact, he is able to meet with his interrogators every day?

MR. GARRE: Your Honor, I want the government's point to be clear that the lawfulness of the present detention in this case isn't dependent on any --

THE COURT: But it has to weigh on my mind. He's still a human being.

MR. GARRE: I think the authorities that we have set out in our motion to dismiss and the Court of Appeals recognized were to call it the long established authority of the military to detain captured combatants during the period of hostilities authorize the detention in this case. The Mobbs' Declaration provides what we think is the factual basis

necessary for --

THE COURT: Let me ask you, Mr. Garre. You probably know. You probably know. Was it a battle or was he just surrendered?

MR. GARRE: The declaration says what it says, which says that he surrendered and gave his firearm to the Northern Alliance forces. That's in paragraph nine. It says he went to Afghanistan to train and fight with the Taliban.

Mr. Dunham, if I understand his arguments today correctly, doesn't dispute, and he certainly did not dispute in the petition, he was in Afghanistan or that he surrendered to these forces or --

THE COURT: Doesn't make much sense.

MR. GARRE: His central position seems to be --

THE COURT: He's never talked with Hamdi, hasn't seen a statement by Hamdi. The only information he has about Hamdi is what you gave him, which is darn little.

MR. GARRE: His argument seems to be he can't be an enemy combatant because he wasn't shooting at United States forces or other forces.

THE COURT: That doesn't have anything to do with it. And I understand that. That doesn't have anything to do with whether he's an enemy combatant.

MR. GARRE: Another thing in the government's view that doesn't have anything to do with that determination is Mr.

Dunham's argument -- suggestion that the war with the Taliban is over.

THE COURT: Let's talk about something else a minute, Mr. Garre.

Suppose I said that I felt that this was not sufficient and that he is an enemy combatant according to them, but he may or may not be. Then you'd have no trouble convening a military tribunal, as the treaty and as the regulations require, in short order, wouldn't you?

MR. GARRE: With respect, Your Honor, I tried to explain why we don't think those regulations are required. We think --

THE COURT: So you wouldn't do it if I gave you some time? Is that what you're telling me, Mr. Garre? If you tell me you wouldn't do it if I gave you some time, I won't waste your time.

MR. GARRE: Your Honor, I'm not in a position here to say what the military would or would not do. What I'm here to say is --

THE COURT: All you have to do is answer. Do you want some time or not, Mr. Garre? I'm going to give it to you on a platter. If you want it, you can take it. If you don't want it, tell me I don't want it.

MR. GARRE: We would ask the Court to find that the Mobbs' Declaration is sufficient and to grant the government's

motion to dismiss. If the Court is not prepared to do that, then we would ask for some time to consider whatever order it would be that the Court would issue as to how proceedings would proceed.

THE COURT: I'm not going to issue any order, Mr. -- I may just say the Mobbs' Declaration is insufficient and give you the reasons for it. In that case, Mr. Garre, if that's what you want, you may find yourself in a position that's ridiculous. Do you understand that? I said -- you can come back tomorrow. You better consult with somebody, Mr. Garre.

MR. GARRE: Yes, Your Honor.

THE COURT: Please consult with somebody, will you?

MR. GARRE: Your Honor, the government would be happy to consult, but I do want the government's position to be clear that the Mobbs' Declaration is sufficient.

THE COURT: I understand the government's position. I'm trying to offer you something nicely, Mr. Garre, but, if you don't want it, you don't have to take it. And all you have to say is, Judge, I don't want it. That's all you have to say. It's just that simple.

MR. GARRE: Your Honor, as I said, if the Court's conclusion is that the declaration is not sufficient, then the government would like some time to consider what the proper course would be at that point. But if, on the other hand, we would -- we have asked the Court to find that the Mobbs'

Declaration is sufficient and to grant the government's motion to dismiss.

THE COURT: I don't want to stop you from taking up an appeal, I guess -- I certainly don't want to do that, Mr. Garre -- if I decide it's insufficient. It appears that it has some great omissions.

MR. GARRE: I don't want to go back and go over ground we've already been through, but we do think --

THE COURT: He has raised some interesting points that I didn't raise. One is an unlawful combatant was not mentioned. And so --

MR. GARRE: If I could address that point. I think it's not relevant to the government's authority to detain Mr. Hamdi. We said that in page eight, note five, of our petition.

THE COURT: So you're no longer trying to maintain that he's an unlawful combatant insofar as the Mobbs' Declaration is concerned, correct?

MR. GARRE: The Mobbs' Declaration states that he was with a Taliban unit and surrendered and turned over his firearm. Now, the President has determined that those captured combatants who were with the Taliban or the al-Qaida are unlawful --

THE COURT: Show me that, where the President has determined anything.

MR. GARRE: I think that's laid out in Judge Ellis'

decision which we referred to.

THE COURT: I'm not worried about Judge Ellis' decision. He isn't here.

MR. GARRE: We referred to it in our legal papers.

THE COURT: Just so you understand, I'll tell you one more time. He's in Alexandria, okay? He's a very, very intelligent, well-reasoned judge. And I'm sure that his decisions have good basis for all of us.

MR. GARRE: The decision --

THE COURT: But he may have been presented with evidence that I have not been presented with.

MR. GARRE: There wouldn't be any evidence to that determination because he's relying on the President's determination --

THE COURT: How do you know? He had all kinds of information, didn't he?

MR. GARRE: It's laid out in the decision where he explains why the President -- he explains the President made this determination. And he concludes that the Taliban falls, in his words --

THE COURT: Stop a minute. So he has made a decision? The President has made a decision that Hamdi is an unlawful enemy combatant?

MR. GARRE: No, Your Honor. The President has determined that the detainees who were captured as Taliban or

al-Qaida, because of their association with the Taliban or the al-Qaida, do not meet the criteria under Article IV of the Geneva Convention for prisoner of war status and, therefore, are unlawful combatants.

THE COURT: Certainly the President is entitled to great deference in relation to the determination of an enemy combatant. No question about that. Whether one meets the criteria set forth in the Geneva Convention is a matter of law; is that correct?

MR. GARRE: Well, we think it's a matter in which the President should have the final say, but Judge Ellis went further --

THE COURT: If the President said that the Geneva Convention says you don't need a military tribunal, then whatever is in the Geneva Convention can be ignored; is that correct?

MR. GARRE: We think that the President is the final say on that political question, and --

THE COURT: I'm not talking about a political question. I'm asking you about a question of law. Isn't it a question of law whether a treaty applies or does not apply?

MR. GARRE: It can be in the appropriate context, yes, but the question of whether or not detainees are considered prisoners of war or that they fall into a different status, that ultimate determination was made by the President

here, and we think -- Judge Ellis went further and discussed the criteria. He said in his words that the Taliban falls far short of meeting the criteria for a POW. And more importantly --

THE COURT: They may indeed fall short, because he indicated that they had no command units and that they had no designation and so forth. But nobody has given me that information. You have said to me we're not giving you anything, Judge.

MR. GARRE: Your Honor, we have presented the Court --

THE COURT: That's what you told me in no uncertain terms, didn't you, Mr. Garre?

MR. GARRE: We presented the Court with the Mobbs' Declaration.

THE COURT: You said we don't have to submit anything, we have the Mobbs' Declaration, and we want to rise or fall on it; isn't that right, Mr. Garre?

MR. GARRE: The government has explained in its motion to dismiss that the Mobbs' Declaration is adequate, it provides more than adequate factual basis for the military's determination that Mr. Hamdi is an enemy combatant.

THE COURT: You didn't want to give me any of Mr. Hamdi's statements, did you?

MR. GARRE: Your Honor, we submitted the Court with

the Mobbs' Declaration. And we think under the governing standard --

THE COURT: I tell you, it's hard to get an answer out of you, isn't it?

Well, you didn't. So I'll put it that way. How is that? You filed a thing saying you weren't going to do it; isn't that correct? And then you went to the Court of Appeals, and they said I have to look at this before I can do anything else.

MR. GARRE: We respectfully asked for relief from this court's order because we did think the Mobbs' Declaration would be sufficient. Now, if the Court were to conclude otherwise, then, as I said earlier, the government would have to consider its options, but we do think that the Mobbs' Declaration is sufficient. And that goes back to the cardinal principles of the Fourth Circuit recognized in its decision.

THE COURT: The problem I have is I have no desire to have an enemy combatant get out of any prisoner of war status he may be in, whatever the status is, whether he's illegal or legal or whatever you want to call it; however, I do think that the process requires something other than a bare assertion by someone by the name of Mobbs that they have looked at some papers and, therefore, they have determined that he should be held incommunicado. Just think about the concept of that. Is that what we're fighting for?

MR. GARRE: Your Honor, I think the authorities we've relied on, the Court of Appeals relied on, is the established -- long established, in the Court of Appeals' words, authority to capture and detain enemy combatants. The Court of Appeals recognized if Mr. Hamdi is indeed an enemy combatant captured in Afghanistan during the hostilities his present detention is a lawful one. This is --

THE COURT: Why, therefore, should we not see what the basis of this decision -- why it was made? Why is it so fearful that we should see the facts upon which that decision was made?

MR. GARRE: Your Honor, I think that the Mobbs' Declaration does provide the central criteria on which that decision was made. It explains that Mr. Hamdi went to Afghanistan to train with and, if necessary, fight with the Taliban. It explains Mr. Hamdi surrendered to Northern Alliance forces, gave -- turned over his AK-47 to those forces.

THE COURT: Does Hamdi agree with that? Did Hamdi agree with that?

MR. GARRE: Your Honor, paragraph nine states in a subsequent interview Hamdi has confirmed --

THE COURT: I understand what paragraph nine said. I asked you, did Hamdi agree with that?

MR. GARRE: The declaration says what it states, and that's what the government --

THE COURT: That's just --

MR. GARRE: The declaration makes clear Hamdi's own statements confirmed the government's determination.

THE COURT: The declaration says -- you know, I can -- Mr. Garre, I've been around too long.

MR. GARRE: Your Honor --

THE COURT: I've heard too many people make explanations of what certain things are. You know, I don't know why we can't see the facts, but we can't.

I'll look at this declaration. I will take some time and go over it again with a view in mind to what you've said, Mr. Garre, concerning the President. I will take into consideration that Judge Ellis has made a particular decision. And I will take into consideration those things that Mr. Mobbs, whomever he may be -- nothing in here to say he's even an employee of the United States, but maybe some consultant or another. And he may be an excellent person. I'm not in any way reflecting on him, other than the fact this declaration doesn't tell me very much about him. Just didn't. He may be the most knowledgeable person about the East that ever has come down the pike. He may have read all the history books on Afghanistan, on the Near East.

MR. GARRE: Your Honor, the declaration explains his substantial involvement with these operations in paragraph one.

THE COURT: Mr. Garre, it's being -- I can be

familiar -- I'm familiar with the operations of this court, and that doesn't mean that because I think someone is guilty that they're guilty. A jury decides that. I may disagree with a jury. I may come to an entirely different conclusion than a jury after listening to the same evidence. So people may see or hear things differently.

MR. GARRE: The declaration also explains the military authorities in Afghanistan interviewed Mr. Hamdi and made this determination.

That goes to another point the Court raised about ambiguity about Northern Alliance forces or the conflict and struggle in Afghanistan. That's precisely one of the reasons why courts should defer to the military in making these sorts of determinations.

THE COURT: I'm trying to defer to the military. I go to the military regulations. You don't want to do those. You don't want to follow them. And, yet, I said, okay, then give me some information why you don't want to follow regulations. And you said we don't think they apply because he's an unlawful. But it doesn't say he's unlawful in here, as Mr. Dunham has pointed out.

MR. GARRE: It does say he is being considered as an enemy combatant because of his association with the Taliban. The President has determined the Taliban --

THE COURT: If that means he's a member of the unit

or he just went there -- he may have gone there to train with them. It may be sufficient. I don't know. I'll look at it, Mr. Garre.

MR. GARRE: Thank you, Your Honor.

THE COURT: You may sit.

Anything else you want to tell me that you haven't brought up? Anything else? Anything else?

MR. DUNHAM: I just have one brief point, Your Honor.

THE COURT: I'll give Mr. Garre an opportunity to answer your one brief point, Mr. Dunham. Go ahead.

MR. DUNHAM: Mr. Garre repeatedly says we're not challenging the conditions of his confinement. What we're challenging by writ of habeas corpus is the basis upon which he's being confined, and we're saying he's not being confined as an enemy combatant in the Norfolk brig. He's being confined as an unlawful combatant. That's how he's being treated.

And we point to the -- we say that detention as an unlawful combatant is unlawful. We say that solitary confinement since 1890 -- this is a case in 1890 where they said solitary confinement was punishment of the worst kind. Here is what this gentleman had. This gentleman had access to attendants, the jailers, physician, spiritual advisor of his own selection.

THE COURT: That was --

MR. DUNHAM: Members of his --

THE COURT: Not even an Army chaplain? He gets to choose what kind of chaplain?

MR. DUNHAM: Right. Members of his family could visit him. And he had access to counsel. And, yet, they said that was punishment of the worst kind. That's in 1890. One would think --

THE COURT: What's the name of that case?

MR. DUNHAM: In re: Medley. It's cited in our brief.

One would thing in over a hundred years we would have a little more enlightened view of things than they had in 1890. But, nevertheless, our point is he's being detained unlawfully. That's the purpose of the writ of habeas corpus. He's being detained as an unlawful enemy combatant, or worse, he's being detained as somebody who they just don't like and so they slapped a label on him and they're going to hold him that way. We don't think it's permissible. We don't think it's allowed for all the reasons we've stated.

THE COURT: All right, Mr. Garre. You've heard his position on that. Do you want to reply?

MR. GARRE: Your Honor, I just would refer the Court to what is in our papers and that we've already stated, and what the Fourth Circuit said, that if Mr. Hamdi is indeed an enemy combatant captured during hostilities in Afghanistan his present detention is a lawful one.

THE COURT: Let me ask you a question. The military

can do anything they want with him if that's the case; is that correct, without any tribunal, without anything? They can do anything?

MR. GARRE: What the military has said is it's treating the detainees --

THE COURT: I didn't ask you what they were doing with them.

MR. GARRE: -- humanely.

THE COURT: I'm asking you as a matter of law can they do anything with him they want? Under your theory of law can they?

MR. GARRE: I think that his present detention is lawful if he's an enemy combatant.

THE COURT: I didn't ask you about the present detention. I'm asking you as a matter of law if a person is an unlawful combatant can the military do anything they want with him? What restraints are there on the military if he's an unlawful combatant? What restraints? Any?

MR. GARRE: Your Honor, I think under the authorities that we've relied upon, that the authorities made clear that --

THE COURT: Any restraint the military has?

MR. GARRE: -- the detention is lawful, that the military has made clear they're treating the detainees humanely and consistent with international law.

THE COURT: Can I beg you to answer my question? My

question is simple. As a matter of law -- we're just talking about the law now, nothing else. Assuming that a man is an unlawful combatant, what restraints are there on the military in relation to treatment?

MR. GARRE: I think the same restraints, if there are restraints, that would apply to Mr. Hamdi would apply to the Guantanamo detainees. And they would be the ones that Judge Kollar-Kotelly referred to in her recent decision, which is --

THE COURT: Okay. Prisoner of war restraints would apply to Hamdi; is that correct?

MR. GARRE: No, Your Honor.

THE COURT: You're saying the same restraints. I'm asking you what restraints. You know, define it. Tell me, what is the restraint, any restraint, anything?

MR. GARRE: Your Honor, I would refer the Court to Judge Kollar-Kotelly's recent decision in the Guantanamo --

THE COURT: I didn't ask you about somebody else's case.

MR. GARRE: I'm trying to answer your question by doing that. With respect, Your Honor, she referred to --

THE COURT: Tell me what you contend they are. Then you can recite what authorities you have.

MR. GARRE: They would be the international processes that take place between nations or nations, states, can communicate with one another on the appropriate conditions for

detainees.

THE COURT: Who communicates on behalf of unlawful detainees?

MR. GARRE: Well --

THE COURT: Unlawful combatants? Who is --

MR. GARRE: Your Honor, there have been communications with governments of --

THE COURT: What governments?

MR. GARRE: For instance, in this case Mr. Hamdi has made requests, as I understand it, to the Ambassador to Saudi Arabia.

THE COURT: Are we at war with Saudi Arabia?

MR. GARRE: No, Your Honor.

THE COURT: Then that's not the government he's battling for, is it?

MR. GARRE: We're talking about a different question, not whether or not we're at war with a particular government.

THE COURT: So his only recourse, then, is the government of the country of which he was a citizen, correct?

MR. GARRE: I don't think that that's correct, Your Honor.

THE COURT: So he has to depend upon them to contact the President of the United States in order to determine what restraints may or may not be imposed?

MR. GARRE: This question is not new. It was

addressed by the Supreme Court in the Eisentrager case. And it was addressed by Judge Kollar-Kotelly recently in the Guantanamo Bay detainees case. It's not a new situation.

The petitioners in this case have never relied on any claim -- and, again, the Court has to go back to the claims in the petition in this case and the Fourth Circuit decision in this case.

THE COURT: How can they go back in the petition when they can't even talk to Hamdi? How do you -- what happens here, you know, the government doesn't want anyone to talk to him other than some chaplain -- we don't even know if it's a chaplain of his own faith -- a chaplain, his custodian, and interrogators? And that's it, correct?

MR. GARRE: Those are the individuals I identified. We think the Fourth Circuit was right --

THE COURT: I must tell you -- have you ever read In Re: Medley? I don't know what it says.

What court is it out of, Mr. Dunham?

MR. DUNHAM: It's the Supreme Court, Your Honor.

MR. GARRE: As I understand it, that case is factually quite distinguishable arising under different contexts and raising different issues.

THE COURT: I'm sure. I haven't read it. I don't know. He will read it.

MR. GARRE: I think what is relevant -- and, again, I

point the Court to what the Fourth Circuit said in this case about Mr. Hamdi's present detention is it's lawful if the military has properly made that determination. And we think that it has.

THE COURT: So the military --

MR. GARRE: For the reasons --

THE COURT: If they sat him in boiling oil and they made that determination, would that be lawful?

MR. GARRE: I'm sorry? I didn't hear the Court's question.

THE COURT: If the military decided to put him in boiling oil, would that be lawful?

MR. GARRE: Your Honor, I don't think anyone has suggested that that has happened or would happen.

THE COURT: So some restraint on the military. What is the restraint?

MR. GARRE: If you go back and look at the Thomasson case in the Fourth Circuit, they talk about the political checks in the military, talk about the separation of powers in this sphere, and the Constitution does grant --

THE COURT: I certainly don't want to interfere with the military. I very much -- I no have no desire to. But I do have a desire to see people are treated as human beings. I have to see to that.

MR. GARRE: The President made clear the detainees

are being treated humanely.

THE COURT: I'm sure the detainees in Guantanamo from -- I've seen newsreels, or whatever you call it on television these days, where they talk to each other, they have lots of things, which certainly Mr. Hamdi does not have obviously.

MR. GARRE: Thank you, Your Honor.

THE COURT: And he's being treated differently, and we don't know why. Do you know why?

MR. GARRE: Your Honor, I believe the military has stated when it brought Mr. Hamdi to Norfolk that he was taken from Guantanamo when a determination was made that he possibly may be an American citizen. It's conceivable that Mr. Hamdi could be moved to a different facility. It's conceivable that other enemy combatants could be brought to Norfolk. When Mr. Hamdi was brought there he happened to be the only enemy combatant. And he is today.

THE COURT: Well, you may be right, Mr. Garre. You may absolutely be right under the -- it's possible. It seems somewhat strange, but it's possible.

MR. GARRE: Thank you, Your Honor.

MR. DUNHAM: Your Honor, without testing the Court's patience, there is one other point, if I could just briefly make as a result of what was said. If I could just make it real quickly.

That is this point that if he's an enemy combatant his detention is lawful is the product of the Fourth Circuit doing what it kind of said this court shouldn't do, which is reaching too far before the District Court got a chance to bite on it. It's purely dicta at this point. The Fourth Circuit only decided that I couldn't see Hamdi under the order that the Court originally -- that was the decision in the case. The rest of the language is purely dicta.

THE COURT: You have to take that up with them, Mr. Dunham. They put it out, and they've said it, and they've held it. That's the decision of the Court of Appeals that they made. They made it based on whatever Mr. -- I assume whatever they heard in argument. I don't know. Must have been on some record. If they did, that's it. I can't very well say anything else, but I can determine whether he's being held in accordance with the Army regulations and the Geneva Convention and whether the Mobbs' Declaration is sufficient. And that's as far as I can go. I can't go any further under the restraints given me by the Court of Appeals.

I'm going to follow those restraints, Mr. Dunham. Your only recourse is to go to a higher court, I'm afraid. I'm not higher than they are.

Okay. Anything else? Anything you want to add, Mr. Garre?

MR. GARRE: No, Your Honor.

THE COURT: Are you through, Mr. Dunham?

MR. DUNHAM: Yes, we are.

THE COURT: You'll hear from me in a couple of days. Let me think about this.

Court is in recess.

(Proceedings were adjourned at 1:10 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile, RMR, CRR

August 16, 2002

Date

PENNY C. WILE, RMR, CRR
OFFICIAL U. S. DISTRICT COURT REPORTER

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FILED
AUG 16 2002
CLERK, U.S. DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp. Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing...with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued

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that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, ex parte, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.

Background

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria"[1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as

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[1] The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria ex parte and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. Hamdi v. Rumsfeld, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. See id. at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. Id. at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. Id. at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. Id. at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals

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further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Id. at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

Discussion

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)(hereinafter Joint Service Regulation). These regulations "provide[] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." Id. at 1. The exact legal force of the these regulations is not now determined, but the

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regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." Id. It specifically lists the GPW as one of the relevant treaties in its determination of international law. Id. At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." Hamdi v. Rumsfeld, 2000 WL 1483908, at *3. The Supreme Court has made it clear that

2. The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. See Joint Service Regulation I-6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee - Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.")(the GPW does not allude to general courts-martial convening authority).

the President is afforded deference when exercising his authority as Commander in Chief. Ex parte Quinn, 317 U.S. 1, 28-29 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This deference extends to military designations of individuals as enemy combatants. Hamdi v. Rumsfeld, 2000 WL 1483908, at *4.

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at *5. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart. ... It would indeed by ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile." United States v. Robel, 389 U.S. 258, 264 (1967).

The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet. Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the Quirin case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in Ex parte Quirin that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. Id. It is apparent that the defendant in Quirin to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While

recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs

3. Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classificanon decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able

4 Confinement for 48 hours triggers the right to a preliminary hearing. Riverside v. McLaughlin, 500 U.S. 44 (1991).

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to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes, rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." Id. The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." Id. Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his

5 Did someone give him a weapon and say "here's the safety and there's the trigger?"

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weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." Id. (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. Id. at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made

6 This doesn't sound like he was expected to fight or escape.

7 The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.

identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. Id. There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." Id. It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." Id. at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

8. Disobedience of regulations generally results in discipline actions.

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The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel of record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

August 14, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI as next friend of YASER ESAM HAMDI, Petitioners,	)	
v.	)	CIVIL ACTION NO. 2:02cv439
DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia, Respondents.	)	

TRANSCRIPT OF TELEPHONIC CONFERENCE

Norfolk, Virginia

August 20, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: LARRY M. SHELTON, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

THE COURT: Identify yourself when speaking, please.

MR. SHELTON: Sir, this is Larry Shelton, Public Defender's Office. Your Honor, I'm calling to request the Court's permission to have until 10 o'clock tomorrow morning to respond to the respondents' motion for certification of interlocutory appeal and for stay.

THE COURT: All right. You oppose it?

MR. LEONARD: Judge, this is Larry Leonard. No, we don't oppose it, Your Honor, and we would like to ask the Court's consideration to delaying the production order for 24 hours to permit time for you to consider the motion.

THE COURT: Well, I don't mind delaying the production order until Monday under the circumstances.

MR. SHELTON: We have no objections, Your Honor, to a reasonable delay.

MR. LEONARD: Thank you, Your Honor.

THE COURT: All right. So we'll do that. But let's discuss the question of the certification, Mr. Leonard.

MR. LEONARD: Yes, sir.

THE COURT: What we'll do is I want it in at 12:00 noon. I'll grant you an extension until 12:00 noon Monday, to be delivered to the judge's chambers 12:00 noon Monday, okay?

MR. LEONARD: The judge's chambers, yes, sir.

THE COURT: And that's -- what is Monday's date?

THE CLERK: The 26th.

MR. LEONARD: The 26th.

THE COURT: August 26th, 2002.

MR. LEONARD: Yes, sir.

THE COURT: 12:00 noon, judge's chambers, under seal.

MR. LEONARD: Yes, sir.

THE COURT: All right. No copies are to be delivered to opposing counsel.

MR. LEONARD: Understood.

THE COURT: All right. Now, something perplexes me, Mr. Leonard. In the order I indicated that material that affected national security could be redacted. Did anybody read that?

MR. LEONARD: Yes, Your Honor.

THE COURT: Well, why are you saying it involves national security when --

MR. GARRE: Your Honor, this is Mr. Garre.

I think our point was that material requested, you know, even allowing for redaction, would account for virtually all the material the Court has requested, so that we appreciate Your Honor's efforts to take into account the national security sensitive nature of the information, but, even taking that into account, the way Your Honor -- it has raised serious issues about what even could be provided to the Court.

THE COURT: Well, tell me, what is the issue? I'm confused now. What is the issue, Mr. Garre? I have a lot of

problems with the issue because what I was trying to do is proceed as cautiously as possible. Now, you're saying that it affects national security. How?

MR. GARRE: Well, I mean, certainly -- and, you know, again this would be something we could get into, you know, in terms of an effort to comply to get to that point but certainly would involve, you know, substantially classified material, as well as material -- and this is something we're evaluating -- that would be --

THE COURT: Did I misunderstand?

MR. GARRE: -- privileged.

THE COURT: My understanding was that evidently Mr. West was not telling Mr. Dunham the truth when he said the material that was given to him was not classified. Have you recently classified it?

MR. GARRE: Your Honor, with respect, I think the materials that Mr. Dunham was referring to are different and wouldn't be subject to materials I'm referring to. We're not talking about the same things. We're referring to statements or notes from intelligence gathering interviews and other materials, names and addresses of those engaged in interviews, including military personnel, primarily on the field in Afghanistan. I think we're referring to different things. Of course, a lot of it would refer to, you know, other stuff that the Court's order referred to, materials that were relevant,

legally relevant, to a determination of Hamdi's status. And, of course, that issue, we think, is tied up with some of the issues that were discussed at the hearing, and that were addressed in the motion for dismissal, and that we think, you know, would be addressed --

THE COURT: Mr. Garre, you can cut it short. What you're saying is you-all feel that certain material, even though it's unclassified, and even though other people have seen it, cannot be seen by the undersigned or this judge; is that correct?

MR. GARRE: No, Your Honor, it's not.

THE COURT: Well, why wouldn't you disclose the information that you've disclosed to Mr. West, who was attorney for Mr. Lindh?

MR. GARRE: I think -- and, again, I don't want to go through material that was the subject of the hearing, but I think a lot of this goes to what is legally relevant to a determination of Mr. Hamdi's status. And --

THE COURT: You know, Mr. --

MR. GARRE: Material that is the subject of the Court's production order if classified -- we haven't maintained that every single piece is classified, but whether or not a single piece of material covered by the order would be classified, we think there is a threshold question of what material the Court would need to see to make an enemy -- to

review the military's enemy combatant determination in this situation, and we think that those issues are addressed by the Court's recent order and would be appropriate for certification to the Court of Appeals so that we can -- we understand Your Honor has made his ruling, but we think that guidance from the Court of Appeals on the appropriate standard here would be of assistance in going forward and determining what types of material would be legally relevant.

Again, I don't want to go on at undue length here, but I think Your Honor's order, initial order, would be materials relevant to Hamdi's legal status.

THE COURT: All right. Let me ask you a couple of questions, Mr. Garre, and this is this: Do you contend, therefore, that the Army regulations do not apply to people in the United States Army?

MR. GARRE: No, Your Honor.

THE COURT: All right. So the Army regulations would apply to any Army person, and the Navy regulations would apply to any Navy person; is that correct?

MR. GARRE: I haven't sat down to reread the regulations this morning, but certainly in the broad sense, yes, Your Honor. I mean, the regulations also have limitations on when and where they do apply, and I don't want to go back through material that was subject to the hearing, but we don't think they would apply in this case.

THE COURT: So the Army regulations do not apply in a case of capturing someone on an enemy -- who's on a battlefield or near a battlefield of someone who is opposing an ally of ours; is that correct? I assume the Northern Alliance is an ally of ours.

MR. GARRE: The Coalition forces we've been fighting with, yes, Your Honor. Again, the main point I wanted to stress at the hearing is that the regulations do define POWs covered by certain provision, and in our view that definition does not encompass Mr. Hamdi.

Again, to make another point that we --

THE COURT: Well, somebody in the Army had to decide it, didn't they?

MR. GARRE: Sure. And that, again, is something we think is covered by --

THE COURT: What the problem is is because they refer to the convening authority being required to establish a military tribunal, and convening authority means a general court-martial convening authority?

MR. GARRE: Once they made a determination as to the legal status, there is no need for that tribunal.

THE COURT: Who was the person who made the decision?

MR. GARRE: Well --

THE COURT: I mean, we're not entitled to know that, or was it Secretary -- the respondent himself who made the

decision? Is he the person?

MR. GARRE: That Mr. Hamdi was an enemy combatant and should be detained is a decision that the Taliban and the al-Qaida are unlawful enemy combatants.

THE COURT: Would you explain to me what unlawful means?

MR. GARRE: Well --

THE COURT: Has he committed a crime? That's what unlawful is generally, correct?

MR. GARRE: Your Honor, I think the way it has been referred under the laws and customs of war, and I think the Quirin case again discusses that, is that unlawful refers to those who don't meet the criteria of --

THE COURT: They didn't say unlawful. They just said he was a belligerent; is that correct? They didn't say he was an unlawful, did they?

MR. GARRE: It goes to those who meet the criteria of the POW status in the Geneva Convention and under the laws and customs of war. Here the President has made the determination that the al-Qaida and the Taliban don't meet those criteria because, for example, they don't wear uniforms when they fight and they don't follow the laws of war because they attack civilians.

THE COURT: Well, I have some problems, starting with McLaughlin. Are you familiar with the McLaughlin case that

says any person who is being held for a criminal offense, that would be an unlawful offense, must have a preliminary hearing within 48 hours?

MR. GARRE: Your Honor, we've made clear Mr. Hamdi is not being held on any criminal charges, and we also made clear --

THE COURT: They didn't say he had charges. They said he had to have a preliminary hearing. You see, unlawful assumes he's done something against the law; is that correct?

MR. GARRE: Under the laws of war, Your Honor --

THE COURT: The laws of war?

MR. GARRE: The laws of war permit the capture and detention --

THE COURT: Who defines the laws of war? Does the Geneva Convention define the laws of war?

MR. GARRE: It may comprise a part of that, but I think it's a much broader --

THE COURT: Because obviously --

MR. GARRE: The Quirin case is the case the Court can look to to describe the particular laws and customs of war that would be applicable here. Again, I want to make the distinction between the determination that al-Qaida and Taliban detainees are unlawful combatants and the determination that was made with respect to Mr. Hamdi, that he should be detained as an enemy combatant. That determination is laid out in the

Mobbs' Declaration. And we appreciate that Your Honor has --

THE COURT: You know, the Medley case indicated that solitary confinement under the terms as set forth in the Colorado statute, which is exactly the same as these terms and conditions; that is, he can be visited by a chaplain or a minister -- only it was a little broader. He could have a minister of his choice. But he could be seen by the custodian, but that's -- they held that was punishment because it -- in order to hold it was an ex post facto law they had to hold it was punishment. And that was in Medley. And then we come along with Gideon that says you're entitled to counsel. And then Miranda.

Obviously at some point they must have suspected him of something. You know, the whole thing is standing on its ear. But, however, Mr. Garre, it does appear that an appropriate solution would be to go ahead and appeal the case.

What do you think, Mr. Shelton? Because then you can go all the way to the Supreme Court. And once it's certified and it's appealed, maybe you can finally get a hearing from either the Court of Appeals or the Supreme Court of the United States.

MR. SHELTON: Your Honor, we want to respond to their motion. We believe there are some things that the Court might want to consider prior to reaching that conclusion, so we certainly would like an opportunity to respond. The Court

could make its decision thereafter. And we intend to have that response filed by 10 o'clock tomorrow morning.

THE COURT: Can you have it filed by 10 o'clock tomorrow morning?

All right. You file it by 10 o'clock tomorrow morning. But here is the problem. I want to make a ruling by tomorrow afternoon. It appears, Mr. Shelton, that certainly the Fourth Circuit has a tremendous interest in this case. It is obvious to me that the respondents do not want to give the information. It also is apparent to me that the respondents are preparing to have what one would say is a standoff between the executive and judicial branches, and that it might be better to have the Court of Appeals go ahead and rule so that we can get out of the way any problems of having a clash between the judiciary and the executive. I am not interested in creating a clash.

MR. SHELTON: Your Honor, we aren't either.

THE COURT: But it's becoming obvious, Mr. Shelton, that whomever is running the case, whether it be the Justice Department or the Defense Department, whichever department is running the case -- and I couldn't tell you who's running the case -- they have made a decision to say we are just not going to do it, we want to hold this man for as long as we want in solitary confinement, which seems to me to be the very antithesis of everything the Constitution stands for.

MR. SHELTON: Your Honor, our position simply is if the government wants to stand on the Mobbs' Declaration -- the Court has found that declaration to be inadequate -- bring Mr. Hamdi before the Court. Get the answers from Mr. Hamdi.

THE COURT: Well, that may be a solution, but in the long run wouldn't it be better to have everything solved?

MR. SHELTON: The Fourth Circuit could not have the benefit of Hamdi's version of facts. We're still going to come back at some point to that determination. So if the government is not prepared to give me that information, we need to bring Mr. Hamdi before the Court.

THE COURT: What do you think about that, Mr. Garre?

MR. GARRE: Well, several things. First, obviously we would oppose that for, you know, many of the same reasons we would oppose sending a lawyer to Mr. Hamdi. And we've already addressed those at length. Secondly, I think that the posture the case is in now has clearly been the focus on the Mobbs' Declaration, which --

THE COURT: No. You have focused it on the Mobbs' Declaration, and the Court of Appeals has sort of agreed with you on that, so perhaps it better go back to the Court of Appeals so they can make a determination with regard to the Mobbs' Declaration.

MR. GARRE: Your Honor, that's certainly the approach that we've --

THE COURT: You must have known that there were a lot of loose ends in the Mobbs' Declaration to start with. I haven't found out who Mobbs is yet. I don't know if he was just hired to make this declaration or not.

MR. GARRE: Your Honor, with respect, I think we addressed that at the hearing. That is covered by the declaration. We understand Your Honor has had questions about that, and --

THE COURT: I don't know who he is. My God, all you've got to do is say he's a special advisor? The whole thing is pretty loose, and, yet, there is no question in my mind that Mr. Hamdi has brought about some of his own problems since he did have a weapon it appears. Couldn't figure out who he was going to shoot with it because he kept it even after he supposedly surrendered. It strikes me as a little odd. It doesn't -- it may not strike you as odd. I'd never heard of anything in any wars that I heard of before. Maybe -- it just struck me as odd.

In any event, the whole thing strikes me as odd; however, I'm seriously thinking about going ahead and certifying it. But Mr. Shelton raises an interesting point, perhaps the solution is to release you from that requirement and just produce Hamdi according to the statute for writs of habeas corpus.

MR. GARRE: Your Honor, we would be happy to respond

to what Mr. Shelton filed, but obviously --

THE COURT: Well, you better respond right now because I'm going to make up my mind tomorrow. This thing has gone on and on, and I want to make up my mind. If we certify it, we are causing Mr. Hamdi to be in confinement for a couple of more months in solitary. Perhaps something could be worked out where he wouldn't be placed in solitary and I wouldn't feel so -- the way I feel. I feel solitary is a means of psychological punishment, if not real punishment. I tend to agree with the Medley case, which is a Supreme Court case, which says it is punishment.

The Fourth Circuit has held you could be there as long as six months as long as you had escape paraphernalia. I don't think anyone has suggested that he has escape paraphernalia, but I'm not sure what his sentence was. Was his sentence one year, two years, 10 years, life? We haven't found that out yet. The sentence is forever?

MR. GARRE: Let me respond to the points. First, we absolutely oppose the notion Mr. Hamdi should be brought into the courtroom. That would mean the most drastic approach.

THE COURT: It would mean no confrontation between the executive and the judiciary.

MR. GARRE: Obviously we would absolutely oppose that, and we would oppose it for the same reasons we opposed providing Mr. Shelton access to Hamdi. And, you know, we've

explained those reasons to the Court. I believe the Court --

THE COURT: The Fourth Circuit has ruled with you up to this point.

MR. GARRE: The letter --

THE COURT: You know something? It does not seem to me to be appropriate subsequent to a decision on the Mobbs' Declaration.

MR. GARRE: I would agree, Your Honor. I think it makes the most sense to certify the issue in the Mobbs' Declaration. As Your Honor noted, that's the issue the Court of Appeals mentioned in its most recent -- issuing the mandate that was the subject of the hearing.

THE COURT: How can I submit a declaration from an individual whom I don't know has any connection with the United States of America? For all I know, he's a Saudi Arabian advisor.

MR. GARRE: Your Honor, I think that the declaration refutes that, that he's been substantially involved in the operation.

THE COURT: He says he is a person who's very familiar with this operation. I would assume the most familiar person would be someone who has knowledge of the area and the people in the area. And that would be somebody like perhaps somebody who has served over there in one capacity or another. I don't know. He may be with the Brookings Institute for all I

know.

MR. GARRE: Your Honor, that's not the case. It's obvious he's a special advisor to the Under Secretary of Defense.

THE COURT: Who is the Under Secretary of Defense? At least he's appointed by the President with the consent of the Senate; is he not?

MR. GARRE: Your Honor, no. The Under Secretary for Policy is. He works for that individual.

THE COURT: I'm not talking about Mobbs. I'm talking about the Under Secretary. Doesn't he have to have Senate consent?

MR. GARRE: Yes, Your Honor. Let me reassure you if the Fourth Circuit determines the legality of Mr. Hamdi's detention turns on whether or not Mr. Mobbs is an employee of the United States, there will be absolutely no issue about that.

THE COURT: What do you mean there is no issue? You mean you're going to present some evidence in the Fourth Circuit? I didn't know they took evidence up there. But I guess you could present anything you like. Maybe they'll give you a hearing.

MR. GARRE: But if --

THE COURT: And you can present Hamdi up there. You can, you know. They can issue a writ of habeas corpus out of

the Fourth Circuit. The Fourth Circuit has a right to do that in a habeas. I think that's one. You can apply to any court in the United States for a habeas. You can apply to any judge in the United States for a habeas for that matter.

So I understand your point, Mr. Garre. It just has me -- it gives me some problems because if we start with Medley and we go to Gideon and then to Miranda and then to McLaughlin --

MR. GARRE: I hope Your Honor would read Quirin as well.

THE COURT: I read Quirin. Quirin was people who landed on the shores of the United States ready to blow up portions of this country. And I'm very familiar with Quirin. And I know what they said. And this fellow is not even -- we don't even know he was going to do anything other than he was receiving some training, according to Mobbs, whom we don't know knows anything. We do know that the circumstances of his capture, or whatever you call it, his taking, would have been written down, according to the Army regulations, giving the date of his capture, the circumstances of his capture, all of these materials that are absolutely required by Army regulations.

And I would presume, and assume, that any person, any officer of the United States, would follow the Army regulations; therefore, you have the information. And if Mobbs

had any grain of sense he would have known the date of capture because somebody would have taken it down. He would have known the circumstances of capture because somebody was required by the regulation to take it down. He would have known a lot of information which he has deliberately omitted from the declaration.

If you deliberately omit material, one has to assume that the material would be adverse to the party presenting it.

MR. GARRE: Your Honor, I would disagree with both the notion he's deliberately omitted things and that you could draw skepticism from that fact. The Mobbs' Declaration contains what we think are the grounds and circumstances resulting in his capture and detention, and it reviews the military's determination he is an enemy combatant.

THE COURT: I don't think -- if you tried to present that before me in a case --

MR. GARRE: Mr. Mobbs --

THE COURT: -- for summary judgment, I would throw you out on your ear; however, since it's the Secretary of Defense that's presenting it, I think it carries some weight because I am not interested in throwing the Secretary of Defense in jail; however, it may be better to certify it, get all of the answers, and then we will determine what happens.

MR. GARRE: Your Honor, in that vein, I mean, we would --

THE COURT: Maybe the Supreme Court of the United States will follow your position. I have serious doubts that you'd ever be able to obtain such a ruling from the Supreme Court of the United States or, indeed, I don't think you're going to get such a favorable ruling from any Court of Appeals of the United States; however, I may still certify it, primarily to avoid a confrontation which has now become obvious.

But, Mr. Shelton, get me that memorandum in here by 10 o'clock tomorrow morning.

MR. SHELTON: Yes, sir.

THE COURT: I will extend the time. I'll get out an order, a short order, saying pursuant to the motion made today that -- I will get out a short order saying that the time is extended until noon, August 26th, to produce the material and then determine -- to give you an opportunity to file a memorandum. And then I will determine whether the matter should be certified.

Now, I'm not quite sure what matter is being certified. What matter do you want to certify exactly?

MR. GARRE: Your Honor, we laid it out in our motion. It would be the issues covered by Your Honor's August 16th order, which would include --

THE COURT: You want to say that the law issue is the sufficiency of the facts contained in the Mobbs' Declaration?

MR. GARRE: That's right, Your Honor, and the validity of the scope and materials requested under the production order. We think that's the two issues.

THE COURT: Either you get one or the other. I'm not allowing any appeal from the production order because I haven't even entertained that. I'm going to issue a stay of that if I certify it. Now, what you want certified is the Mobbs' Declaration. The production order gets to be ridiculous because you're yelling it's national security, and it isn't even involved under any circumstances.

MR. GARRE: Well --

THE COURT: Look, Mr. Garre, it gets ridiculous. And it's insulting to me. And I'm sorry to say that a judge would have the gall to -- what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.

MR. GARRE: Your Honor --

THE COURT: Most insulting. And you tell the Secretary that I said so. And I'm instructing you to say so to him. And that's enough of that. However, I am seriously thinking about certifying the question of the Mobbs' Declaration. Don't get me into the other situation when you're yelling national security. I don't know who drew that paper or who put that in there, but don't impugn my loyalty to this country.

MR. LEONARD: Your Honor, this is Larry Leonard.

I can assure you that there was no intention on the respondents' part to do that at all. The question of the information did not have to do with any uncertainty on the part of the government that there would ever be such a writ, Your Honor. The focus of the issue is whether or not the Mobbs' Declaration stands alone and therefore it would require the production of additional information of this nature, certainly not that Your Honor might do something untoward with it or in any event question the integrity in the very least, Your Honor.

MR. GARRE: Your Honor, this is Mr. Garre.

I would echo Mr. Leonard's statements.

THE COURT: Well, you see, what bothered me, very frankly, is the fact that I said file it under seal in camera. I don't know how more secure I could make it other than that.

MR. LEONARD: Your Honor, I mean, we've fully noted -- we fully intend to provide to the Court the classified document regarding the screening --

THE COURT: Don't provide me with anything. I made my decision on the Mobbs' Declaration. I've made my decision. Just provide what I asked for, but don't provide me anything after I've made my ruling.

MR. LEONARD: Very well.

THE COURT: Just don't. I don't want something to clutter up the record. I asked for it. You're not giving me

anything else. You want to give me something that you think might be advantageous so you can present it to the Court of Appeals and then say, hey, look, this judge made a mistake? Look, I still probably will certify it unless Mr. Leonard can persuade me not to.

My inclination is I am not interested in getting into a situation where we clash with the executive department. And I'm certainly not interested in trying to hold the Secretary in contempt.

You'll file the material, Mr. Shelton, by 10 o'clock tomorrow morning.

Mr. Garre, the order is extended until the 26th at noon. I'll get out a short order on that based on the hearing today.

Is there anything else you want to take up?

MR. SHELTON: No, Your Honor. Nothing from the petitioners' standpoint.

MR. GARRE: Nothing from the respondents, Your Honor. Thank you very much for your time.

THE COURT: Good-bye.

(The proceedings were concluded.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile

Penny Commander Wile, RMR, CRR

August 29, 2002

Date

FILED
AUG 21 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

CERTIFICATION ORDER AND STAY

This Court certifies the following question to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

Certified Question: Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

Certification of this question is appropriate because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Court's August 16, 2002, Order may materially advance the ultimate termination of this litigation.

The Court STAYS the deadline for compliance with its August 16, 2002, production Order until five (5) days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question.

Procedural History

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham filed a habeas corpus petition, naming as petitioners both Yaser Esam Hamdi and himself

as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. Hamdi v. Rumsfeld, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. See id. at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed

in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. Id. at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. Id. at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. Id. at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the appeals court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002, Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Id. at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002, Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

On August 16, 2002, this Court held the Mobbs Declaration insufficient as a matter of law to justify Hamdi's classification as an enemy combatant. Instead of ordering the government to allow the Federal Public Defender access to Hamdi and in the interest of the least intrusive measures

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possible, the Court ordered the government to produce the documents previously requested in its July 31, 2002, Order.[1] The Court required the production of the documents by August 21, 2002. To allay any concerns regarding national security implications of the requested documents, the Court ordered the sealed documents be produced ex parte and solely for in camera review.

On August 19, 2002, the Respondents filed a Motion for Certification of Interlocutory Appeal and for Stay. On August 20, 2002, the Court held a telephonic conference with lawyers for both sides to discuss the effect of the motion on the Court's production Order.[2] The Respondents requested an extension of time for compliance with this Court's August 16, 2002, production Order while the Court considered their latest motion. After considering the matter, the Court ordered Petitioners to file any response to Respondents' Motion by August 21, 2002, and granted the Respondents an extension of time on the production order until August 26, 2002.

Discussion

The Respondents' Motion for Certification of Interlocutory Appeal and for Stay requests that this Court certify the question of whether the Mobbs Declaration, *standing alone*, is sufficient to allow this Court to conduct a meaningful judicial review of Hamdi's classification status. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 1 [hereinafter Resp't Mot.]. Under 28 U.S.C. § 1292(b), the Court has the discretion to certify such an appeal from an interlocutory order. Certification is proper if the following criteria are met: (1) the order involves a controlling question

1 The 16 August, 2002, Order also required the Respondents to produce the screening criteria used to make the determination of Hamdi's status as an enemy combatant. The Respondents indicated in its Motion for Certification that it was now willing to turn the criteria over. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 2 n.1.

2 All telephonic conferences are with a clerk and a court reporter.

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of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

I. The August 16, 2002, Order Involves a Controlling Question of Law

The Respondents' assert that the Court's production Order involves a controlling question of law. As support for this proposition, the respondents' cite the recent Court of Appeals for the Fourth Circuit's statement that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Resp't Mot., at 2-3 (quoting Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002)). It is unclear what the Court of Appeals meant by this statement and this Court has several reservations regarding the implications of such a finding. First, the Executive's unilateral determination of Hamdi's status appears to violate the protections afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a signatory. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW requires that any doubt regarding a person's status be determined "by a competent tribunal." Id. at Article 5. There is no evidence from the facts before the Court, limited as they are, that Hamdi's status was determined by a competent tribunal. The Court notes that the GPW never mentions the term "enemy combatant." ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7-8 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war.")(internal citations omitted).

The second reservation that the Court has regarding the lawfulness of the Executive's unilateral determination of Hamdi's status is that it appears to violate the joint service regulations governing the detention of captured enemy combatants or others. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)(hereinafter Joint Service Regulation). The Joint Service Regulation indicate that where a detainee's status is in doubt, a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a prisoner of war. Joint Service Regulation 1-6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."). Here again, there is no evidence before the Court that Hamdi's status was determined by a military tribunal in accordance with the Joint Service Regulation.

In addition to the reservations listed above, the Court points out that any finding that the Executive can unilaterally classify a person born in the United States as an enemy combatant, justify the classification on naked assertions such as those contained in the Mobbs Declaration, and thereby claim the authority to hold the detainee indefinitely, incommunicado, and in solitary confinement may have grave consequences for numerous Supreme Court precedents and their progeny. See Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)(holding that a judicial determination of probable cause is required within 48 hours of person being taken into custody); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Medley, 134 U.S. 160, 168-71 (1890)(holding that solitary confinement is a form of punishment).

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Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determinanon of Hamdi's status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." August 8, 2002, Order at 2. As painstakingly set forth in this Court's August 16, 2002, Order, the Court found the Mobbs Declaration insufficient to allow the Court to conduct a meaningful judicial review of Hamdi's classification as an enemy combatant. Among the many shortcomings of the Mobbs Declaration highlighted by the Court, the Court found that the declaration failed to: (1) explain who Mr. Mobbs is and establish his authority to make or review Hamdi's classification as an enemy combatant; (2) establish that the government's classification of Hamdi's status was determined pursuant to appropriate authority to make such determinations; (3) establish that the screening criteria used to make and maintain Hamdi's classification met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law; and (4) explain the governmental determination that Hamdi's continuing detention without charges and without access to counsel serves national security. In light of these omissions, as well as the others set forth in the August 16, 2002, Order, this Court was forced to find the Mobbs Declaration insufficient as a matter of law.

While the Court feels that the Mobbs Declaration is clearly insufficient, *standing alone*, to justify Hamdi's classification, it recognizes that such a decision necessarily implicates the broader question of the degree of deference due to the Executive's determination. In earlier opinions, the Court of Appeals made it clear that the Executive is entitled to a great level of deference. But, the Appeals Court also declined to dismiss the petition, stating "[i]n dismissing ... with no meaningful

judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002)(emphasis added). In its August 16, 2002, Order, this Court set forth the criteria it believes represent the balance between the appropriate level of deference to the Executive and the meaningful judicial review required under the circumstances. In applying these criteria to the Mobbs Declaration, the Court found the Declaration insufficient. However, given the Court of Appeals statement that if Hamdi is found to be an enemy combatant, then his detention is lawful, it appears that this Court's determination regarding the sufficiency of the Mobbs Declaration is a controlling question of law. If the Court held the Mobbs Declaration sufficient to classify Hamdi as an enemy combatant, then the Court of Appeals has indicated that judicial review of his status is at an end.

II. Substantial Ground Exists for Difference of Opinion

Due to the implications regarding the criteria set forth by the Court to conducts its judicial review of Hamdi's classification, the Court acknowledges that substantial ground exists for a difference of opinion regarding the sufficiency of the Mobbs Declaration. The Court believes that judicial deference to the Executive's authority cannot justify approving of Hamdi's classification as an enemy combatant based solely on the say-so of a "Special Adviser" to the Under Secretary of Defense for Policy. However, given the great deference that the Executive is entitled to in time of hostilities, the Court realizes that reasonable minds may differ in this opinion. This realization is enforced by the Court of Appeals for the Fourth Circuit's emphasis that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the Court's respect at every step." Hamdi, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002).

III. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current detention is foreclosed. Despite any reservations this Court may have about this proposition, this Court is bound to follow the dictates of the Court of Appeals for the Fourth Circuit. To fail to do so would stand over 200 years of American jurisprudence on its ear.

If the appellate court affirms this Court's holding that the Mobbs Declaration is insufficient, then this may also materially advance the ultimate termination of the litigation. It has become obvious that the Respondents appear to be prepared to defy this Court's production Order, and, thereby, create a confrontation between the executive and judicial branches of our government. While this Court would like to avoid any such confrontation, it will not abdicate its Constitutional responsibilities to do so. If the Court of Appeals affirms this Court's August 16, 2002, production Order, then this Court hopes that it will give the Respondents pause before embarking on a confrontation that would be harmful to both the Executive and the Judiciary.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel of record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

August 21, 2002

(9)

Supreme Court, U.S.
FILED
JAN 23 2004
OFFICE OF THE CLERK

No. 03-6696

In The

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

OFFICE OF THE FEDERAL
PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800 (telephone)
(703) 600-0880 (facsimile)
Counsel for Petitioners

THEODORE B. OLSON
Solicitor General
Counsel of Record

DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217 (telephone)
(202) 514-8844 (facsimile)
Counsel for Respondents

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser
Esam Hamdi,

Petitioners,

v. **CIVIL ACTION NO. 2:02cv439**

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

(Filed Aug. 16, 2002)

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp. Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing . . . with no

meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, *ex parte*, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.

Background

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria"[1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was

[1] The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria *ex parte* and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of

the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

Discussion

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*

(Oct. 1, 1997) (hereinafter Joint Service Regulation). These regulations "provide[] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." *Id.* at 1. The exact legal force of these regulations is not now determined, but the regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." *Id.* It specifically lists the GPW as one of the relevant treaties in its determination of international law. *Id.* At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at

[2] The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. *See* Joint Service Regulation 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee – Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and

(Continued on following page)

this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi v. Rumsfeld*, 2000 WL 1483908, at *3. The Supreme Court has made it clear that the President is afforded deference when exercising his authority as Commander in Chief. *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This deference extends to military designations of individuals

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having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.") (the GPW does not allude to general courts-martial convening authority).

as enemy combatants. *Hamdi v. Rumsfeld*, 2000 WL 1483908, at *4.

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." *Id.* at *5. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart. . . . It would indeed by [sic] ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment

rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet. Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the *Quirin* case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in *Ex parte Quirin* that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. *Id.* It is apparent that the defendant in *Quirin* to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

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[3] Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

[4] Confinement for 48 hours triggers the right to a preliminary hearing. *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes, rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." *Id.* The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons

training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." *Id.* Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified

[5] Did someone give him a weapon and say "here's the safety and there's the trigger?"

[6] This doesn't sound like he was expected to fight or escape.

himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." *Id.* (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. *Id.* at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

[7] The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. *Id.* There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." *Id.* It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the

government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men

[8] Disobedience of regulations generally results in discipline actions.

and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or [sic] record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/ Robert G. Doumar
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

August 16, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, as next friend of YASER ESAM HAMDI, Petitioners, v. DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia, Respondents.	)	CIVIL ACTION NO. 2:02cv439

TRANSCRIPT OF TELEPHONIC CONFERENCE

Norfolk, Virginia

August 20, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

[2] Appearances:

FEDERAL PUBLIC DEFENDER
By: LARRY M. SHELTON, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

[3] THE COURT: Identify yourself when speaking, please.

MR. SHELTON: Sir, this is Larry Shelton, Public Defender's Office. Your Honor, I'm calling to request the Court's permission to have until 10 o'clock tomorrow morning to respond to the respondents' motion for certification of interlocutory appeal and for stay.

THE COURT: All right. You oppose it?

MR. LEONARD: Judge, this is Larry Leonard. No, we don't oppose it, Your Honor, and we would like to ask the Court's consideration to delaying the production order for 24 hours to permit time for you to consider the motion.

THE COURT: Well, I don't mind delaying the production order until Monday under the circumstances.

MR. SHELTON: We have no objections, Your Honor, to a reasonable delay.

MR. LEONARD: Thank you, Your Honor.

THE COURT: All right. So we'll do that. But let's discuss the question of the certification, Mr. Leonard.

MR. LEONARD: Yes, sir.

THE COURT: What we'll do is I want it in at 12:00 noon. I'll grant you an extension until 12:00 noon Monday, to be delivered to the judge's chambers 12:00 noon Monday, okay?

MR. LEONARD: The judge's chambers, yes, sir.

THE COURT: And that's – what is Monday's date?

THE CLERK: The 26th.

[4] MR. LEONARD: The 26th.

THE COURT: August 26th, 2002.

MR. LEONARD: Yes, Sir.

THE COURT: 12:00 noon, judge's chambers, under seal.

MR. LEONARD: Yes, Sir.

THE COURT: All right. No copies are to be delivered to opposing counsel.

MR. LEONARD: Understood.

THE COURT: All right. Now, something perplexes me, Mr. Leonard. In the order I indicated that material that affected national security could be redacted. Did anybody read that?

MR. LEONARD: Yes, Your Honor.

THE COURT: Well, why are you saying it involves national security when –

MR. GARRE: Your Honor, this is Mr. Garre.

I think our point was that material requested, you know, even allowing for redaction, would account for virtually all the material the Court has requested, so that we appreciate Your Honor's efforts to take into account the national security sensitive nature of the information, but, even taking that into account, the way Your Honor – it has raised serious issues about what even could be provided to the Court.

THE COURT: Well, tell me, what is the issue? I'm confused now. What is the issue, Mr. Garre? I have a lot of [5] problems with the issue because what I was trying to do is proceed as cautiously as possible. Now, you're saying that it affects national security. How?

MR. GARRE: Well, I mean, certainly – and, you know, again this would be something we could get into, you know, in terms of an effort to comply to get to that point but certainly would involve, you know, substantially classified material, as well as material – and this is something we're evaluating – that would be –

THE COURT: Did I misunderstand?

MR. GARRE: – privileged.

THE COURT: My understanding was that evidently Mr. West was not telling Mr. Dunham the truth when he said the material that was given to him was not classified. Have you recently classified it?

MR. GARRE: Your Honor, with respect, I think the materials that Mr. Dunham was referring to are different and wouldn't be subject to materials I'm referring to. We're not talking about the same things. We're referring to statements or notes from intelligence gathering interviews and other materials, names and addresses of those engaged in interviews, including military personnel, primarily on the field in Afghanistan. I think we're referring to different things. Of course, a lot of it would refer to, you know, other stuff that the Court's order referred to, materials that were relevant, [6] legally relevant, to a determination of Hamdi's status. And, of course, that issue, we think, is tied up with some of the issues that were discussed at the hearing, and that were addressed in

the motion for dismissal, and that we think, you know, would be addressed –

THE COURT: Mr. Garre, you can cut it short. What you're saying is you-all feel that certain material, even though it's unclassified, and even though other people have seen it, cannot be seen by the undersigned or this judge; is that correct?

MR. GARRE: No, Your Honor, it's not.

THE COURT: Well, why wouldn't you disclose the information that you've disclosed to Mr. West, who was attorney for Mr. Lindh?

MR. GARRE: I think – and, again, I don't want to go through material that was the subject of the hearing, but I think a lot of this goes to what is legally relevant to a determination of Mr. Hamdi's status. And –

THE COURT: You know, Mr. –

MR. GARRE: Material that is the subject of the Court's production order if classified – we haven't maintained that every single piece is classified, but whether or not a single piece of material covered by the order would be classified, we think there is a threshold question of what material the Court would need to see to make an enemy – to [7] review the military's enemy combatant determination in this situation, and we think that those issues are addressed by the Court's recent order and would be appropriate for certification to the Court of Appeals so that we can – we understand Your Honor has made his ruling, but we think that guidance from the Court of Appeals on the appropriate standard here would be of assistance in going forward and determining what types of material would be legally relevant.

Again, I don't want to go on at undue length here, but I think Your Honor's order, initial order, would be materials relevant to Hamdi's legal status.

THE COURT: All right. Let me ask you a couple of questions, Mr. Garre, and this is this: Do you contend, therefore, that the Army regulations do not apply to people in the United States Army?

MR. GARRE: No, Your Honor.

THE COURT: All right. So the Army regulations would apply to any Army person, and the Navy regulations would apply to any Navy person; is that correct?

MR. GARRE: I haven't sat down to reread the regulations this morning, but certainly in the broad sense, yes, Your Honor. I mean, the regulations also have limitations on when and where they do apply, and I don't want to go back through material that was subject to the hearing, but we don't think they would apply in this case.

[8] THE COURT: So the Army regulations do not apply in a case of capturing someone on an enemy – who's on a battlefield or near a battlefield of someone who is opposing an ally of ours; is that correct? I assume the Northern Alliance is an ally of ours.

MR. GARRE: The Coalition forces we've been fighting with, yes, Your Honor. Again, the main point I wanted to stress at the hearing is that the regulations do define POWs covered by certain provision, and in our view that definition does not encompass Mr. Hamdi.

Again, to make another point that we –

THE COURT: Well, somebody in the Army had to decide it, didn't they?

MR. GARRE: Sure. And that, again, is something we think is covered by –

THE COURT: What the problem is is because they refer to the convening authority being required to establish a military tribunal, and convening authority means a general court-martial convening authority?

MR. GARRE: Once they made a determination as to the legal status, there is no need for that tribunal.

THE COURT: Who was the person who made the decision?

MR. GARRE: Well –

THE COURT: I mean, we're not entitled to know that, or was it Secretary – the respondent himself who made the [9] decision? Is he the person?

MR. GARRE: That Mr. Hamdi was an enemy combatant and should be detained is a decision that the Taliban and the al-Qaida are unlawful enemy combatants.

THE COURT: Would you explain to me what unlawful means?

MR. GARRE: Well –

THE COURT: Has he committed a crime? That's what unlawful is generally, correct?

MR. GARRE: Your Honor, I think the way it has been referred under the laws and customs of war, and I think the *Quirin* case again discusses that, is that unlawful refers to those who don't meet the criteria of –

THE COURT: They didn't say unlawful. They just said he was a belligerent; is that correct? They didn't say he was an unlawful, did they?

MR. GARRE: It goes to those who meet the criteria of the POW status in the Geneva Convention and under the laws and customs of war. Here the President has made the determination that the al-Qaida and the Taliban don't meet those criteria because, for example, they don't wear uniforms when they fight and they don't follow the laws of war because they attack civilians.

THE COURT: Well, I have some problems, starting with *McLaughlin*. Are you familiar with the *McLaughlin* case that [10] says any person who is being held for a criminal offense, that would be an unlawful offense, must have a preliminary hearing within 48 hours?

MR. GARRE: Your Honor, we've made clear Mr. Hamdi is not being held on any criminal charges, and we also made clear –

THE COURT: They didn't say he had charges. They said he had to have a preliminary hearing. You see, unlawful assumes he's done something against the law; is that correct?

MR. GARRE: Under the laws of war, Your Honor –

THE COURT: The laws of war?

MR. GARRE: The laws of war permit the capture and detention –

THE COURT: Who defines the laws of war? Does the Geneva Convention define the laws of war?

MR. GARRE: It may comprise a part of that, but I think it's a much broader –

THE COURT: Because obviously –

MR. GARRE: The *Quirin* case is the case the Court can look to to describe the particular laws and customs of war that would be applicable here. Again, I want to make the distinction between the determination that al-Qaida and Taliban detainees are unlawful combatants and the determination that was made with respect to Mr. Hamdi, that he should be detained as an enemy combatant. That determination is laid out in the [11] Mobbs' Declaration. And we appreciate that Your Honor has –

THE COURT: You know, the *Medley* case indicated that solitary confinement under the terms as set forth in the Colorado statute, which is exactly the same as these terms and conditions; that is, he can be visited by a chaplain or a minister – only it was a little broader. He could have a minister of his choice. But he could be seen by the custodian, but that's – they held that was punishment because it – in order to hold it was an *ex post facto* law they had to hold it was punishment. And that was in *Medley*. And then we come along with *Gideon* that says you're entitled to counsel. And then *Miranda*.

Obviously at some point they must have suspected him of something. You know, the whole thing is standing on its ear. But, however, Mr. Garre, it does appear that an appropriate solution would be to go ahead and appeal the case.

What do you think, Mr. Shelton? Because then you can go all the way to the Supreme Court. And once it's

certified and it's appealed, maybe you can finally get a hearing from either the Court of Appeals or the Supreme Court of the United States.

MR. SHELTON: Your Honor, we want to respond to their motion. We believe there are some things that the Court might want to consider prior to reaching that conclusion, so we certainly would like an opportunity to respond. The Court [12] could make its decision thereafter. And we intend to have that response filed by 10 o'clock tomorrow morning.

THE COURT: Can you have it filed by 10 o'clock tomorrow morning?

All right. You file it by 10 o'clock tomorrow morning. But here is the problem. I want to make a ruling by tomorrow afternoon. It appears, Mr. Shelton, that certainly the Fourth Circuit has a tremendous interest in this case. It is obvious to me that the respondents do not want to give the information. It also is apparent to me that the respondents are preparing to have what one would say is a standoff between the executive and judicial branches, and that it might be better to have the Court of Appeals go ahead and rule so that we can get out of the way any problems of having a clash between the judiciary and the executive. I am not interested in creating a clash.

MR. SHELTON: Your Honor, we aren't either.

THE COURT: But it's becoming obvious, Mr. Shelton, that whomever is running the case, whether it be the Justice Department or the Defense Department, whichever department is running the case – and I couldn't tell you who's running the case – they have made a decision to say we are just not going to do it, we want to hold

this man for as long as we want in solitary confinement, which seems to me to be the very antithesis of everything the Constitution stands for.

[13] MR. SHELTON: Your Honor, our position simply is if the government wants to stand on the Mobbs' Declaration – the Court has found that declaration to be inadequate – bring Mr. Hamdi before the Court. Get the answers from Mr. Hamdi.

THE COURT: Well, that may be a solution, but in the long run wouldn't it be better to have everything solved?

MR. SHELTON: The Fourth Circuit could not have the benefit of Hamdi's version of facts. We're still going to come back at some point to that determination. So if the government is not prepared to give me that information, we need to bring Mr. Hamdi before the Court.

THE COURT: What do you think about that, Mr. Garre?

MR. GARRE: Well, several things. First, obviously we would oppose that for, you know, many of the same reasons we would oppose sending a lawyer to Mr. Hamdi. And we've already addressed those at length. Secondly, I think that the posture the case is in now has clearly been the focus on the Mobbs' Declaration, which –

THE COURT: No. You have focused it on the Mobbs' Declaration, and the Court of Appeals has sort of agreed with you on that, so perhaps it better go back to the Court of Appeals so they can make a determination with regard to the Mobbs' Declaration.

MR. GARRE: Your Honor, that's certainly the approach that we've –

[14] THE COURT: You must have known that there were a lot of loss [sic] ends in the Mobbs' Declaration to start with. I haven't found out who Mobbs is yet. I don't know if he was just hired to make this declaration or not.

MR. GARRE: Your Honor, with respect, I think we addressed that at the hearing. That is covered by the declaration. We understand Your Honor has had questions about that, and –

THE COURT: I don't know who he is. My God, all you've got to do is say he's a special advisor? The whole thing is pretty loose, and, yet, there is no question in my mind that Mr. Hamdi has brought about some of his own problems since he did have a weapon it appears. Couldn't figure out who he was going to shoot with it because he kept it even after he supposedly surrendered. It strikes me as a little odd. It doesn't – it may not strike you as odd. I'd never heard of anything in any wars that I heard of before. Maybe – it just struck me as odd.

In any event, the whole thing strikes me as odd; however, I'm seriously thinking about going ahead and certifying it. But Mr. Shelton raises an interesting point, perhaps the solution is to release you from that requirement and just produce Hamdi according to the statute for writs of habeas corpus.

MR. GARRE: Your Honor, we would be happy to respond [15] to what Mr. Shelton filed, but obviously –

THE COURT: Well, you better respond right now because I'm going to make up my mind tomorrow. This thing has gone on and on, and I want to make up my

mind. If we certify it, we are causing Mr. Hamdi to be in confinement for a couple of more months in solitary. Perhaps something could be worked out where he wouldn't be placed in solitary and I wouldn't feel so – the way I feel. I feel solitary is a means of psychological punishment, if not real punishment. I tend to agree with the *Medley* case, which is a Supreme Court case, which says it is punishment.

The Fourth Circuit has held you could be there as long as six months as long as you had escape paraphernalia. I don't think anyone has suggested that he has escape paraphernalia, but I'm not sure what his sentence was. Was his sentence one year, two years, 10 years, life? We haven't found that out yet. The sentence is forever?

MR. GARRE: Let me respond to the points. First, we absolutely oppose the motion Mr. Hamdi should be brought into the courtroom. That would mean the most drastic approach.

THE COURT: It would mean no confrontation between the executive and the judiciary.

MR. GARRE: Obviously we would absolutely oppose that, and we would oppose it for the same reasons we opposed providing Mr. Shelton access to Hamdi. And, you know, we've [16] explained those reasons to the Court. I believe the Court –

THE COURT: The Fourth Circuit has ruled with you up to this point.

MR. GARRE: The letter –

THE COURT: You know something? It does not seem to me to be appropriate subsequent to a decision on the Mobbs' Declaration.

MR. GARRE: I would agree, Your Honor. I think it makes the most sense to certify the issue in the Mobbs' Declaration. As Your Honor noted, that's the issue the Court of Appeals mentioned in its most recent – issuing the mandate that was the subject of the hearing.

THE COURT: How can I submit a declaration from an individual whom I don't know has any connection with the United States of America? For all I know, he's a Saudi Arabian advisor.

MR. GARRE: Your Honor, I think that the declaration refutes that, that he's been substantially involved in the operation.

THE COURT: He says he is a person who's very familiar with this operation. I would assume the most familiar person would be someone who has knowledge of the area and the people in the area. And that would be somebody like perhaps somebody who has served over there in one capacity or another. I don't know. He may be with the Brookings Institute for all I [17] know.

MR. GARRE: Your Honor, that's not the case. It's obvious he's a special advisor to the Under Secretary of Defense.

THE COURT: Who is the Under Secretary of Defense? At least he's appointed by the President with the consent of the Senate; is he not?

MR. GARRE: Your Honor, no. The Under Secretary for Policy is. He works for that individual.

THE COURT: I'm not talking about Mobbs. I'm talking about the Under Secretary. Doesn't he have to have Senate consent?

MR. GARRE: Yes, Your Honor. Let me reassure you if the Fourth Circuit determines the legality of Mr. Hamdi's detention turns on whether or not Mr. Mobbs is an employee of the United States, there will be absolutely no issue about that.

THE COURT: What do you mean there is no issue? You mean you're going to present some evidence in the Fourth Circuit? I didn't know they took evidence up there. But I guess you could present anything you like. Maybe they'll give you a hearing.

MR. GARRE: But if –

THE COURT: And you can present Hamdi up there. You can, you know. They can issue a writ of habeas corpus out of [18] the Fourth Circuit. The Fourth Circuit has a right to do that in a habeas. I think that's one. You can apply to any court in the United States for a habeas. You can apply to any judge in the United States for a habeas for that matter.

So I understand your point, Mr. Garre. It just has me – it gives me some problems because if we start with *Medley* and we go to *Gideon* and then to *Miranda* and then to *McLaughlin* –

MR. GARRE: I hope Your Honor would read *Quirin* as well.

THE COURT: I read *Quirin*. *Quirin* was people who landed on the shores of the United States ready to blow up portions of this country. And I'm very familiar

with *Quirin*. And I know what they said. And this fellow is not even – we don't even know he was going to do anything other than he was receiving some training, according to Mobbs, whom we don't know knows anything. We do know that the circumstances of his capture, or whatever you call it, his taking, would have been written down, according to the Army regulations, giving the date of his capture, the circumstances of his capture, all of these materials that are absolutely required by Army regulations.

And I would presume, and assume, that any person, any officer of the United States, would follow the Army regulations; therefore, you have the information. And if Mobbs [19] had any grain of sense he would have known the date of capture because somebody would have taken it down. He would have known the circumstances of capture because somebody was required by the regulation to take it down. He would have known a lot of information which he has deliberately omitted from the declaration.

If you deliberately omit material, one has to assume that the material would be adverse to the party presenting it.

MR. GARRE: Your Honor, I would disagree with both the notion he's deliberately omitted things and that you could draw skepticism from that fact. The Mobbs' Declaration contains what we think are the grounds and circumstances resulting in his capture and detention, and it reviews the military's determination he is an enemy combatant.

THE COURT: I don't think – if you tried to present that before me in a case –

MR. GARRE: Mr. Mobbs –

THE COURT: – for summary judgment, I would throw you out on your ear; however, since it's the Secretary of Defense that's presenting it, I think it carries some weight because I am not interested in throwing the Secretary of Defense in jail; however, it may be better to certify it, get all of the answers, and then we will determine what happens.

MR. GARRE: Your Honor, in that vein, I mean, we would –

[20] THE COURT: Maybe the Supreme Court of the United States will follow your position. I have serious doubts that you'd ever be able to obtain such a ruling from the Supreme Court of the United States or, indeed, I don't think you're going to get such a favorable ruling from any Court of Appeals of the United States; however, I may still certify it, primarily to avoid a confrontation which has now become obvious.

But, Mr. Shelton, get me that memorandum in here by 10 o'clock tomorrow morning.

MR. SHELTON: Yes, sir.

THE COURT: I will extend the time. I'll get out an order, a short order, saying pursuant to the motion made today that – I will get out a short order saying that the time is extended until noon, August 26th, to produce the material and then determine – to give you an opportunity to file a memorandum. And then I will determine whether the matter should be certified.

Now, I'm not quite sure what matter is being certified. What matter do you want to certify exactly?

MR. GARRE: Your Honor, we laid it out in our motion. It would be the issues covered by Your Honor's August 16th order, which would include –

THE COURT: You want to say that the law issue is the sufficiency of the facts contained in the Mobbs' Declaration?

[21] MR. GARRE: That's right, Your Honor, and the validity of the scope and materials requested under the production order. We think that's the two issues.

THE COURT: Either you get one or the other. I'm not allowing any appeal from the production order because I haven't even entertained that. I'm going to issue a stay of that if I certify it. Now, what you want certified is the Mobbs' Declaration. The production order gets to be ridiculous because you're yelling it's national security, and it isn't even involved under any circumstances.

MR. GARRE: Well –

THE COURT: Look, Mr. Garre, it gets ridiculous. And it's insulting to me. And I'm sorry to say that a judge would have the gall to – what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.

MR. GARRE: Your Honor –

THE COURT: Most insulting. And you tell the Secretary that I said so. And I'm instructing you to say so to him. And that's enough of that. However, I am seriously thinking about certifying the question of the Mobbs' Declaration. Don't get me into the other situation when you're yelling national security. I don't know who drew

that paper or who put that in there, but don't impugn my loyalty to this country.

[22] MR. LEONARD: Your Honor, this is Larry Leonard.

I can assure you that there was no intention on the respondents' part to do that at all. The question of the information did not have to do with any uncertainty on the part of the government that there would ever be such a writ, Your Honor. The focus of the issue is whether or not the Mobbs' Declaration stands alone and therefore it would require the production of additional information of this nature, certainly not that Your Honor might do something untoward with it or in any event question the integrity in the very least, Your Honor.

MR. GARRE: Your Honor, this is Mr. Garre.

I would echo Mr. Leonard's statements.

THE COURT: Well, you see, what bothered me, very frankly, is the fact that I said file it under seal in camera. I don't know how more secure I could make it other than that.

MR. LEONARD: Your Honor, I mean, we've fully noted – we fully intend to provide to the Court the classified document regarding the screening –

THE COURT: Don't provide me with anything. I made my decision on the Mobbs' Declaration. I've made my decision. Just provide what I asked for, but don't provide me anything after I've made my ruling.

MR. LEONARD: Very well.

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THE COURT: Just don't. I don't want something to clutter up the record. I asked for it. You're not giving me [23] anything else. You want to give me something that you think might be advantageous so you can present it to the Court of Appeals and then say, hey, look, this judge made a mistake? Look, I still probably will certify it unless Mr. Leonard can persuade me not to.

My inclination is I am not interested in getting into a situation where we clash with the executive department. And I'm certainly not interested in trying to hold the Secretary in contempt.

You'll file the material, Mr. Shelton, by 10 o'clock tomorrow morning.

Mr. Garre, the order is extended until the 26th at noon. I'll get out a short order on that based on the hearing today.

Is there anything else you want to take up?

MR. SHELTON: No, Your Honor. Nothing from the petitioners' standpoint.

MR. GARRE: Nothing from the respondents, Your Honor. Thank you very much for your time.

THE COURT: Good-bye.

(The proceedings were concluded.)

[24] CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Penny Commander Wile
Penny Commander Wile, RMR, CRR

August 20, 2002
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of
Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

CIVIL ACTION
NO. 2:02cv439

CERTIFICATION ORDER AND STAY

(Filed Aug. 21, 2002)

This Court certifies the following question to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

Certified Question: Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

Certification of this question is appropriate because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Court's August 16, 2002, Order may materially advance the ultimate termination of this litigation.

The Court **STAYS** the deadline for compliance with its August 16, 2002, production Order until five (5) days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question.

Procedural History

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Yaser Esam Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June

11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In

doing so, the appeals court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002, Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002, Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

On August 16, 2002, this Court held the Mobbs Declaration insufficient as a matter of law to justify Hamdi's classification as an enemy combatant. Instead of ordering the government to allow the Federal Public Defender access to Hamdi and in the interest of the least intrusive measures possible, the Court ordered the government to produce the documents previously requested in its July 31, 2002, Order.[1] The Court required the

[1] The 16 August, 2002, Order also required the Respondents to produce the screening criteria used to make the determination of Hamdi's status as an enemy combatant. The Respondents indicated in its Motion for Certification that it was now willing to turn the criteria over. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 2 n.1.

production of the documents by August 21, 2002. To allay any concerns regarding national security implications of the requested documents, the Court ordered the sealed documents be produced ex parte and solely for in camera review.

On August 19, 2002, the Respondents filed a Motion for Certification of Interlocutory Appeal and for Stay. On August 20, 2002, the Court held a telephonic conference with lawyers for both sides to discuss the effect of the motion on the Court's production Order.[2] The Respondents requested an extension of time for compliance with this Court's August 16, 2002, production Order while the Court considered their latest motion. After considering the matter, the Court ordered Petitioners to file any response to Respondents' Motion by August 21, 2002, and granted the Respondents an extension of time on the production order until August 26, 2002.

Discussion

The Respondents' Motion for Certification of Interlocutory Appeal and for Stay requests that this Court certify the question of whether the Mobbs Declaration, *standing alone*, is sufficient to allow this Court to conduct a meaningful judicial review of Hamdi's classification status. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 1 [hereinafter Resp't Mot.]. Under 28 U.S.C. § 1292(b), the Court has the discretion to certify such an appeal from an interlocutory order. Certification

[2] All telephonic conferences are with a clerk and a court reporter.

is proper if the following criteria are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

I. The August 16, 2002, Order Involves a Controlling Question of Law

The Respondents' assert that the Court's production Order involves a controlling question of law. As support for this proposition, the respondents' [sic] cite the recent Court of Appeals for the Fourth Circuit's statement that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Resp't Mot., at 2-3 (quoting *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002)). It is unclear what the Court of Appeals meant by this statement and this Court has several reservations regarding the implications of such a finding. First, the Executive's unilateral determination of Hamdi's status appears to violate the protections afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a signatory. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW requires that any doubt regarding a person's status be determined "by a competent tribunal." *Id.* at Article 5. There is no evidence from the facts before the Court, limited as they are, that Hamdi's status was determined by a competent tribunal. The Court notes that the GPW

never mentions the term "enemy combatant." ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7-8 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war.") (internal citations omitted).

The second reservation that the Court has regarding the lawfulness of the Executive's unilateral determination of Hamdi's status is that it appears to violate the joint service regulations governing the detention of captured enemy combatants or others. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) (hereinafter Joint Service Regulation). The Joint Service Regulation indicate [sic] that where a detainee's status is in doubt, a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a prisoner of war. Joint Service Regulation 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.") Here again, there is no evidence before the Court that Hamdi's status was determined by a military tribunal in accordance with the Joint Service Regulation.

In addition to the reservations listed above, the Court points out that any finding that the Executive can unilaterally classify a person born in the United States as an enemy combatant, justify the classification on naked

assertions such as those contained in the Mobbs Declaration, and thereby claim the authority to hold the detainee indefinitely, incommunicado, and in solitary confinement may have grave consequences for numerous Supreme Court precedents and their progeny. *See Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that a judicial determination of probable cause is required within 48 hours of person being taken into custody); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Medley*, 134 U.S. 160, 168-71 (1890) (holding that solitary confinement is a form of punishment).

Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determination of Hamdi's status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." August 8, 2002, Order at 2. As painstakingly set forth in this Court's August 16, 2002, Order, the Court found the Mobbs Declaration insufficient to allow the Court to conduct a meaningful judicial review of Hamdi's classification as an enemy combatant. Among the many shortcomings of the Mobbs Declaration highlighted by the Court, the Court found that the declaration failed to: (1) explain who Mr. Mobbs is and establish his authority to make or review Hamdi's classification as an enemy combatant; (2) establish that the government's classification of Hamdi's status was determined pursuant to appropriate authority to make such determinations; (3) establish that the screening criteria used to make and maintain Hamdi's classification met sufficient procedural requirements as to be consistent

with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law; and (4) explain the governmental determination that Hamdi's continuing detention without charges and without access to counsel serves national security. In light of these omissions, as well as the others set forth in the August 16, 2002, Order, this Court was forced to find the Mobbs Declaration insufficient as a matter of law.

While the Court feels that the Mobbs Declaration is clearly insufficient, *standing alone*, to justify Hamdi's classification, it recognizes that such a decision necessarily implicates the broader question of the degree of deference due to the Executive's determination. In earlier opinions, the Court of Appeals made it clear that the Executive is entitled to a great level of deference. But, the Appeals Court also declined to dismiss the petition, stating "[i]n dismissing . . . with no *meaningful judicial review*, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi*, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added). In its August 16, 2002, Order, this Court set forth the criteria it believes represent the balance between the appropriate level of deference to the Executive and the meaningful judicial review required under the circumstances. In applying these criteria to the Mobbs Declaration, the Court found the Declaration insufficient. However, given the Court of Appeals statement that if Hamdi is found to be an enemy combatant, then his detention is lawful, it appears that this Court's determination regarding the sufficiency of the Mobbs Declaration is a controlling question of law. If the Court held the Mobbs Declaration sufficient to classify Hamdi as an enemy combatant, then the Court of Appeals

has indicated that judicial review of his status is at an end.

II. Substantial Ground Exists for Difference of Opinion

Due to the implications regarding the criteria set forth by the Court to conduct[] its judicial review of Hamdi's classification, the Court acknowledges that substantial ground[s] exist[] for a difference of opinion regarding the sufficiency of the Mobbs Declaration. The Court believes that judicial deference to the Executive's authority cannot justify approving of Hamdi's classification as an enemy combatant based solely on the say-so of a "Special Adviser" to the Under Secretary of Defense for Policy. However, given the great deference that the Executive is entitled to in time of hostilities, the Court realizes that reasonable minds may differ in this opinion. This realization is enforced by the Court of Appeals for the Fourth Circuit's emphasis that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the Court's respect at every step." *Hamdi*, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002).

III. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current

detention is foreclosed. Despite any reservations this Court may have about this proposition, this Court is bound to follow the dictates of the Court of Appeals for the Fourth Circuit. To fail to do so would stand over 200 years of American jurisprudence on its ear.

If the appellate court affirms this Court's holding that the Mobbs Declaration is insufficient, then this may also materially advance the ultimate termination of the litigation. It has become obvious that the Respondents appear to be prepared to defy this Court's production Order, and, thereby, create a confrontation between the executive and judicial branches of our government. While this Court would like to avoid any such confrontation, it will not abdicate its Constitutional responsibilities to do so. If the Court of Appeals affirms this Court's August 16, 2002, production Order, then this Court hopes that it will give the Respondents pause before embarking on a confrontation that would be harmful to both the Executive and the Judiciary.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/ Robert G. Doumar
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

August 21, 2002

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296 F.3d 278

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-6895

YASER ESAM HAMDI; ESAM
FOUAD HAMDI, as next friend
of Yaser Esam Hamdi,

Petitioners-Appellees,

versus

DONALD RUMSFELD;
W. R. PAULETTE, Commander,

Respondents-Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (CA-02-439-2)

Argued: June 25, 2002 Decided: July 12, 2002

Before WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Traxler joined.

ARGUED: Paul D. Clement, Deputy Solicitor General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Geremy Charles Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Alice S. Fisher, Deputy Assistant Attorney General, Gregory G. Garre, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Frank W. Dunham, Jr., Federal Public Defender, Robert J. Wagner, Assistant Federal Public Defender, Larry W. Shelton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees.

WILKINSON, Chief Judge:

Esam Fouad Hamdi has filed a petition for a writ of habeas corpus as next friend of his son, Yaser Esam Hamdi, a detainee at the Norfolk Naval Station Brig who was captured as an alleged enemy combatant during ongoing military operations in Afghanistan. In its order of June 11, 2002, the district court concluded that Hamdi's father properly filed his case as next friend, appointed the Federal Public Defender for the Eastern District of Virginia as counsel for the petitioners, and ordered the government to allow the Public Defender unmonitored access to Hamdi. Because the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and before allowing the United States even to respond, we reverse the court's June 11 order mandating access to

counsel and remand the case for proceedings consistent with this opinion.

I.

As recounted in the earlier appeal regarding Hamdi's detention, *Hamdi v. Rumsfeld*, No. 02-6827, the al Qaida terrorist network launched massive attacks on the United States on September 11, 2001, killing approximately 3,000 people. In the wake of this tragedy, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President responded by ordering United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. During this ongoing military operation, thousands of alleged enemy combatants have been captured by American and allied forces including, as the government contends, Hamdi.

Hamdi was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba. After it came to light that he was born in Louisiana and may not have renounced his American citizenship, Hamdi was brought to the Norfolk Naval Station Brig. His petition claims he was taken into custody in Afghanistan in the fall of 2001, transferred to Guantanamo Bay in January 2002, and transferred again to Norfolk in April 2002. Believing that Hamdi's detention is necessary for intelligence gathering efforts, the United States has determined that Hamdi

should continue to be detained as an enemy combatant in accordance with the laws and customs of war.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. The Public Defender had been in contact with Hamdi's father, but the father had not sought to be appointed as next friend as of the time the Defender filed his petition. Subsequently, one Christian Peregrim, a private citizen from New Jersey, filed a separate habeas petition on Hamdi's behalf, naming the United States Navy as respondent. On May 29, the district court held a hearing, consolidated the Public Defender's petition with Peregrim's, and concluded that the Defender's case was "properly filed by Frank Dunham as next friend."

After directing the government to respond by June 13, the district court ordered that "Hamdi must be allowed to meet with his attorney because of fundamental justice provided under the Constitution." Further, the court ordered that the meeting be unmonitored and be allowed to take place as of June 1, twelve days before the government's answer was due.

On May 31, the United States filed a motion for stay pending appeal of the district court's access order. We stayed the court's order and heard oral argument four days later.

While these cases were under submission, Hamdi's father filed a separate petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 & 2242, naming as petitioners both Hamdi and himself as next friend. This petition is presently before us. The father's petition asked, *inter alia*,

that the district court: (1) "Grant Petitioner Esam Fouad Hamdi Next Friend status, as Next Friend of Yaser Esam Hamdi;" (2) "Appoint counsel to represent Yaser Esam Hamdi because he is indigent and has no funds with which to retain counsel in the United States;" (3) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending;" and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody." Unlike the Public Defender's petition, the father's petition did not specifically request that counsel be granted unmonitored access to Hamdi.

On June 11, before the government had been served with the father's petition, the district court determined that Hamdi's father could proceed as next friend. The court then ordered the government to answer by noon on June 17, and appointed the Public Defender as counsel for the detainee based on the father's affidavit stating that neither he nor his son was able to pay for an attorney. *See* 18 U.S.C. § 3006A. Further, the court again ordered the government to allow the Defender unmonitored access to Hamdi "for the same reasons articulated in the May 29, 2002 Order." The court specified that this meeting was to be "private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way." And the court ordered that the meeting be allowed to take place by June 14, three days before the government's response was due. Finally, the court stayed its order to allow the government an opportunity to appeal.

On June 13, the United States filed a second motion for stay pending appeal. The following day, we stayed both

the district court's June 11 order and all proceedings before that court regarding the detainee. We heard oral argument on the instant appeal on June 25.

We subsequently dismissed the habeas petitions filed by the Public Defender and Peregrim as Hamdi's next friend. Neither had a significant relationship with the detainee, *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002), and Hamdi's father plainly had a significant relationship with his son and had filed a valid next friend petition. *See id.* at 3 n.1. We therefore turn to the district court's June 11 order.[1]

II.

The order arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable. It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 & n.2 (1952) (Jackson, J., concurring). Indeed, Articles I and II prominently assign to Congress and the President the shared

[1] For the same reasons stated in our previous opinion, *see Hamdi*, No. 02-6827, slip op. at 5 n.2, we are presented here with an appealable order.

responsibility for military affairs. *See* U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981); *Curtiss-Wright*, 299 U.S. at 319-20; *United States v. The Three Friends*, 166 U.S. 1, 63 (1897); *Stewart v. Kahn*, 78 U.S. 493, 506 (1870); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents. *See The Prize Cases*, 67 U.S. (2 Black) at 670. And in World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts. *Ex parte Quirin*, 317 U.S. 1, 25 (1942). It was inattention to these cardinal principles of constitutional text and practice that led to the errors below.

III.

The district court's June 11 order directed the United States to provide the Public Defender unmonitored access to Hamdi. And petitioners contend that order represented an unexceptional exercise of a district court's discretion in a case challenging the legality of an American citizen's

restraint. Petitioners' characterization, however, is incomplete. The court's order was not merely a garden-variety appointment of counsel in an ordinary criminal case. If it had been, the lower court's discretion would be almost plenary and hardly a subject for appeal, much less reversal. *See* 18 U.S.C. § 3006A. But the June 11 order was different in kind. In the face of ongoing hostilities, the district court issued an order that failed to address the many serious questions raised by Hamdi's case.

For example, it has been the government's contention that Hamdi is an "enemy combatant" and as such "may be detained at least for the duration of the hostilities." The government has asserted that "enemy combatants who are captured and detained on the battlefield in a foreign land" have "no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention, much less to meet with counsel in private, without military authorities present." The Public Defender for his part has contended that "no evidence has been submitted to support" Hamdi's status as an enemy combatant and that "unlike aliens located outside the United States, Petitioner Hamdi [as an American citizen detained in the United States] is entitled to constitutional protections" including unmonitored access to counsel.

The district court's June 11 order purported to resolve these and many other questions without proper benefit of briefing and argument. Indeed the court directed that counsel have unmonitored access to Hamdi three days before the government's response was even due. There is little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns. The peremptory nature of the proceedings stands in contrast to the significance of the issues

before the court. The June 11 order does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence. The order does not ask to what extent federal courts are permitted to review military judgments of combatant status. Indeed, the order does not mention the term enemy combatant at all.

Instead, the June 11 order apparently assumes (1) that Hamdi is not an enemy combatant or (2) even if he might be such a person, he is nonetheless entitled not only to counsel but to immediate and unmonitored access thereto. Either ruling has sweeping implications for the posture of the judicial branch during a time of international conflict, and neither may rest on a procedurally flawed foundation that denied both petitioners and the government a chance to properly present their arguments, or to lay even a modest foundation for meaningful appellate review. The district court's order must be reversed and remanded for further proceedings.

IV.

A.

The government urges us not only to reverse and remand the June 11 order, but in the alternative to reach further and dismiss the instant petition in its entirety. In its brief before this court, the government asserts that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant

– that its determinations on this score are the first and final word.

Any dismissal of the petition at this point would be as premature as the district court's June 11 order. In dismissing, we ourselves would be summarily embracing a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so. Given the interlocutory nature of this appeal, a remand rather than an outright dismissal is appropriate.

If dismissal is thus not appropriate, deference to the political branches certainly is. It should be clear that circumspection is required if the judiciary is to maintain its proper posture of restraint. *The Prize Cases*, 67 U.S. at 670 ("[T]his Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."). The federal courts have many strengths, but the conduct of combat operations has been left to others. *See, e.g., Quirin*, 317 U.S. at 25-26. The executive is best prepared to exercise the military judgment attending the capture of alleged combatants. The political branches are best positioned to comprehend this global war in its full context and it is the President who has been charged to use force against those "nations, organizations, or persons *he determines*" were responsible for the September 11 terrorist attacks. Authorization for Use of Military Force, 115 Stat. at 224 (emphasis added). The unconventional aspects of the present struggle do not make its stakes any less grave. Accordingly, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the

protection of Americans, both military and civilian, against additional unprovoked attack.

B.

The standards and procedures that should govern this case on remand are not for us to resolve in the first instance. It has long been established that if Hamdi is indeed an "enemy combatant" who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one. *See, e.g., Quirin*, 317 U.S. at 31, 37 (holding that both lawful and unlawful combatants, regardless of citizenship, "are subject to capture and detention as prisoners of war by opposing military forces"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946) (same); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (same). Separation of powers principles must, moreover, shape the standard for reviewing the government's designation of Hamdi as an enemy combatant. Any standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.

As for procedures, we cannot blueprint them on this appeal. The government has sought to file as an *ex parte*, supplemental attachment to its brief before this court "a sealed declaration discussing the military's determination to detain petitioner Hamdi as an enemy combatant." The government explains that "[t]his declaration is not a matter of record, as it was not proffered in the district court because the proceedings there did not reach the point where the merits of the habeas petition were reached." The government further states that the declaration "specifically delineates the manner in which the

military assesses and screens enemy combatants to determine who among them should be brought under Department of Defense control," and "describes how the military determined that petitioner Hamdi fit the eligibility requirements applied to enemy combatants for detention." This declaration is factual in nature. As such, it should come first before the district court, not the court of appeals.

The development of facts may pose special hazards of judicial involvement in military decision-making that argument of questions of pure law may not. For example, allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Articles I and II on their heads. Finally, the role that counsel should or should not play in resolving questions of law or fact is a matter of immense importance.[2]

V.

Upon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary. Our Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step. Because the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its

[2] Whether the financial eligibility requirements of 18 U.S.C. § 3006A have been satisfied is likewise an issue we leave for remand.

actions and before allowing the United States even to respond, we reverse the court's June 11 order mandating access to counsel and remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

(SEAL)

U.S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530
August 2, 2002

VIA FACSIMILE

Ms. Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Rumsfeld v. Hamdi, No. 02-6895

Dear Ms. Connor:

In connection with Respondents' Emergency Motion for Stay Pending Appeal, filed June 13, 2002, in the above captioned appeal, Respondents submitted the declaration of Colonel Donald D. Woolfolk (a copy of which is attached hereto). In that declaration, Colonel Woolfolk explained the vital role that interrogations of enemy combatants such as Yaser Esam Hamdi play in ensuring the security of this Nation and its citizens, and that Hamdi's background suggested "considerable knowledge of Taliban and al Qaida training and operations" that could make Hamdi "have future value as a source of intelligence." Woolfolk Decl. at 2. Colonel Woolfolk also indicated that, at the time of his declaration, the Department of Defense had "voluntarily chosen to suspend active interrogations of [Hamdi] pending resolution of legal matters." *Ibid.*

I am writing to inform the Court that the Department of Defense has informed me that, in light of a recent change in circumstances, it has determined to resume interrogations of Hamdi for intelligence purposes. The Department of Defense has also informed me that, in its judgment, these interrogations, which resumed today, are compelled by important national security concerns. Should the Court deem it necessary, Respondents can provide a declaration ex parte and under seal concerning these changed circumstances. However, because the interviews are being conducted solely for intelligence purposes, and are unavailable to counsel for the Respondents, information concerning the interviews themselves could not be included in such a filing. Although we do not believe that this development affects the opinion issued by this Court, we wish to inform the Court so that the record may be clear on this point.

Accordingly, we request that this letter be distributed to the panel in the above-referenced case as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

/s/ Paul D. Clement
Paul D. Clement
Principal Deputy
Solicitor General

Enclosure

cc: Hon. Robert G. Doumar
Frank W. Dunham, Jr.

ATTACHMENT C

FOR OFFICIAL USE ONLY

Declaration of DONALD D. WOOLFOLK

Pursuant to 28 U.S.C. 1746, I, Donald D. Woolfolk, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

(FOUO) I am a Colonel in the US Army with 30 years Active Federal Commissioned Service. I currently am the Deputy Commander, Joint Task Force (JTF) 170, Guantanamo Bay, Cuba, however, I am serving today as the Acting Commander. As such, I am directly responsible for the successful execution of the JTF 170 mission to fully exploit the intelligence value of terrorist personnel, Taliban, and al Qaida personnel detained worldwide. Currently, there are in excess of 450 detainees being held at the detainee camp at Guantanamo Bay, Cuba.

(U) The security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence. Put simply, intelligence saves lives. Nowhere has this proposition become more apparent than in our nation's current War on Terrorism. Absent a total commitment to intelligence gathering efforts, incidents like those that occurred on September 11th could become tragically common.

(U) The Department of Defense has expended considerable effort to develop effective intelligence techniques, particularly during Operation Enduring Freedom. The Department of Defense employs numerous means and methods to learn information from various sources that may assist everyone from the commanders in the field in Afghanistan

to the police chiefs in small towns throughout the United States. A critical element of the intelligence process is that it must be continuous. The timely, effective use of intelligence provides this nation with the best chance of both achieving unqualified success in combating terrorism abroad and maintaining domestic tranquility at home.

(FOUO) A fundamental tool used in the gathering of intelligence is interrogation. This method of active intelligence gathering permits collection of information from sources with direct knowledge of, among other things, plans, locations and persons seeking to do harm to the United States and our citizens. When done effectively, interrogation provides information that likely could not be gleaned from any other source. Loss of this tool, in any respect, would undermine our nation's intelligence gathering efforts, thus crippling the national security of the United States. The United States does not employ any corporal means of coercion to gain information from persons being interrogated. Rather, the United States has adopted a humane approach to interrogation that relies upon creating an atmosphere of dependency and trust between detainees and the intelligence gathering staff assigned to that detainee. Over time, information is learned. The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the global War on Terrorism. This is because it is recognized that they unquestionably hold critical information that is crucial to our national security. A prime example of the effectiveness of this method of interrogation through dependency and trust can be found in the announcement this week of the U.S. Government's disruption and detention of a U.S. citizen working in coordination with al Qaida to detonate a

"dirty bomb" in the United States. Knowledge and disruption of this plot may not have occurred absent effective intelligence gathered through interrogation.

(FOUO) Interrogation leading to the development of meaningful and usable intelligence is not static. The collection of intelligence is active and ongoing. As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented. We are now living in an age where our nation is engaged in international armed conflict against terrorism. Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Under such circumstances the need to maintain the tightly controlled environment, which has been established to create dependency and trust by the detainee with his interrogator, is of paramount importance. Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic. Should this occur, a critical resource may be lost, resulting in a direct threat to national security.

(FOUO) It has been brought to my attention that efforts are underway to provide detainee Yaser Esam Hamdi, an enemy combatant currently being detained in the Naval brig in Norfolk, Virginia, with access to counsel. Permitting such access to detainee Hamdi may create substantial harm to U.S. national security interests. Most importantly, the disruption occasioned by the insertion of outside counsel will sever the intelligence gathering value of this detainee. As stated previously, the intelligence gathering process must be continuous. As new information is learned from other sources it serves as a new avenue of interrogation with detained enemy combatants.

(FOUO) Detainee Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaida training and operations. While we have voluntarily chosen to suspend active interrogations of this detainee pending resolution of legal matters, he could have future value as a source of intelligence. Granting access by counsel under these circumstances will not only disrupt the secure interrogation environment that the United States has labored to create, it will thwart any opportunity to develop intelligence through this detainee.

(FOUO) Further, providing counsel access to detainee Hamdi may have unintended consequences in a number of other ways. For instance, al Qaida training literature and intelligence gathering efforts have revealed that members have been trained in means of covert communication during periods of capture. As such, counsel could unwittingly provide information to the detainee, or be used by the detainee as a communication tool. This may open an information conduit between detainee Hamdi and members of al Qaida, the Taliban, or other terrorist groups against whom the United States is actively engaged in combat. Also, detainee Hamdi is the only detainee that has been under U.S. control in Afghanistan, Guantanamo Bay and Norfolk. Harmful information could be intentionally or unintentionally passed on concerning these facilities, thus increasing the threat to US forces and facilities in those areas. Finally, information from, or concerning, detainee Hamdi could be brought to the attention of terrorists who later themselves become detainees in Guantanamo Bay. Armed with any such knowledge, such "new" detainees may be able to poison the interrogation environment currently being maintained in Guantanamo

Bay by information derived as a result of counsel access to Hamdi.

/s/ Donald D. Woolfolk
Signature of Declarant

Executed on 13 June 2002

UNITED STATES COURT OF APPEALS

FOR THE FOURTH COURT

No. 02-6895
(CA-02-439-2)

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners-Appellees,

versus

DONALD RUMSFELD; W.R. PAULETTE, Commander,

Respondents-Appellants.

ORDER

(Filed Aug. 8, 2002)

Appellees have filed a motion to dissolve this Court's stay order of June 14, 2002. Appellants have filed a response in opposition.

The mandate in *Hamdi v. Rumsfeld*, No. 02-6895, shall issue forthwith and the stay is dissolved in order that the district court may proceed in strict compliance with our July 12, 2002 decision. In that decision, we directed the court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Hamdi v. Rumsfeld*, 2002 WL 1483908 (4th Cir. July 12, 2002).

In accordance with the principles set forth in that opinion, the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Wilkins and Judge Traxler.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
RICHMOND, VIRGINIA

Yaser Esam Hamdi

v. CASE NO: 02-7338

Donald Rumsfeld

Transcript in the above-styled matter when heard before the United States Court of Appeals for the Fourth Circuit, on Monday, October 28th, 2002.

[2] APPEARANCES:

Paul Clement
Deputy Solicitor General
Washington, D.C.

Frank W. Dunham, Jr.
Federal Public Defender
Alexandria, Virginia

[1] THE CLERK Oyez, Oyez, Oyez, the United States Court of Appeals for the Fourth Circuit is now sitting to hear argument in the Hamdi versus Rumsfeld, 02-7338, before Chief Judge J. Harvey Wilkinson, III; Judge William W. Wilkins, Jr. and Judge William P. Traxler, Jr. Arguing on behalf of the Appellant is Mr. Clement, Deputy Solicitor General. Arguing on behalf of the Appellee is Frank W. Dunham, Jr., Assistant Federal Public Defender for the Eastern District of Virginia.

JUDGE WILKINS Good afternoon, we're here to hear argument in Hamdi vs. Rumsfeld.

MR. CLEMENT Good afternoon, Chief Judge Wilkinson and Your Honors, and may it please Judge

Wilkins. It has been a little over four months since this court last heard argument in the Hamdi case but the essentials in the case remain the same. The major difference is since the last time this court heard this case there has been substantial development of the record below and in particular the respondents have filed a Motion to Dismiss the petition with an accompanying declaration that provides a fuller factual backdrop of the case and helps develop the legal issues before Judge Wilkins. Now, the District Court saw that declaration and found it inadequate and by implication found the respondents Motion to Dismiss inadequate and he did that despite recognizing that he quote had no doubts that Hamdi [2] went to Afghanistan to be with the Taliban, and that he had a weapon and that he was there to fight. Now, those factors should of been enough to convince the District Court that Hamdi is a prototypical enemy combatant. But instead the District Court found the declaration inadequate and ordered an unprecedented production order that required the government to produce everything from the law notes of intelligence interviews to the names and addresses of all the individuals who talked to Mr. Hamdi. Now, with respect I think the District Court could only have simultaneously recognized that Hamdi was in Afghanistan to be with the Taliban, that he had a firearm and that he was there to fight and reject the governments Motion to Dismiss by ignoring this courts instruction in the earlier appeal that the District Court and Judge Wilkins generally owe deference in this area to the military's determinations.

JUDGE WILKINS One of the things that concerns the District Court was the indefinite nature of

the detention and Hamdi is to be detained for the duration of hostilities. One thing I wanted to ask you, is what hostilities do you understand to be talking about? Are we talking about the hostilities in Afghanistan or are we talking about hostilities these are the al-Qaida, or are we talking about hostilities in a broader sense in a sense in the war on terrorism? Which hostilities have to end in order for this confinement to come to [3] an end, which set of hostilities are the relevant ones?

MR. CLEMENT Well, Your Honor, I think that the relevant hostilities are broader than just the ongoing hostilities that are taking place in Afghanistan and I think the starting point would be to take a look at the joint resolution that Congress passed. Because they recognized that the authorization for force and support of the President's inherent authority as Commander in Chief was to deal with the al-Qaida and those responsible for the attacks of September 11th.

JUDGE WILKINS You're talking about a broader set of hostilities than specifically those in Afghanistan. What other parameters of hostilities, which hostilities are we talking about, hostilities against whom?

MR. CLEMENT Well, I think we're talking about hostilities against those responsible for the attacks of September 11th and those who supported them. And I think that the focus is on al-Qaida but also in regimes like the Taliban that supported the al-Qaida and I think what you would –

JUDGE WILKINS Would you give us a sense or any benchmark as to when the executive was determined that those hostilities had concluded, or are we

talking about months or years, or how far into the future?

MR. CLEMENT Well, I think we're talking about certainly at least months and probably some [4] years, but I think in answering the question I think it's important to recognize that there may be a difference with respect to certain detainees. Because if you talk about somebody who's being detained as a core member of the al-Qaida, the cessation of hostilities in Afghanistan may be of little relevance to that persons continuing threat. But if you talked about somebody who has been involved with the Taliban but perhaps not the al-Qaida then it may be the cessation of hostilities in Afghanistan is a more important benchmark and it may be that they –

JUDGE WILKINS Which do you consider Hamdi to be?

MR. CLEMENT Well, certainly the supporting declaration makes clear that Hamdi went to Afghanistan to be with the Taliban and there's no suggestion in the declaration that he's affiliated with the al-Qaida.

JUDGE WILKINS If Hamdi went to Afghanistan to be with the Taliban, would the relevant conclusion of hostilities be the end of the hostilities in Afghanistan? I understand you think that they're not concluded yet, you indicated that American forces had been under fire and are still searching the Eastern mountain passes for evidence of terrorist tracks. But the, if Hamdi's affiliation with the Taliban is what we're concerned about here, the hostilities would be those in Afghanistan.

[5] MR. CLEMENT Again, I think they may be the relative benchmark for Hamdi and I think ultimately though there's going to be an executive determination and I don't want to foreclose the possibility that the executive based on interrogations or interviews with Hamdi determines that he actually poses a broader threat that goes beyond Afghanistan. But if we put that possibility to one side –

JUDGE WILKINS Does it – justiciable issues?

MR. CLEMENT Well, I don't think that the end of hostilities is a justiciable issue and I think the Supreme Court recognized that Ludeci case and I think when hostilities end is a classic political question. I think, if I could suggest Chief Judge Wilkinson what you might have if there was in fact an executive declaration that hostilities in Afghanistan had ceased and then the government continued to hold somebody like Hamdi past that point, at that point that might be a basis for another petition for habeas corpus and at that point the government may have to come forward with again, some evidence as to why it's continuing to detain him. But I think, again I don't want to foreclose the possibility that somebody like Hamdi might need to be detained after the hostilities are closed in a particular front on this ongoing war.

JUDGE WILKINS In terms of illegal detention I realize it takes a great deal of time to gather [6] intelligence and that as one gathers it from many sources. Is Mr. Hamdi still of use in your intelligence gathering activities or is this somebody who is being held just to create precedent. Is Hamdi still in accordance, it's been six months now since he was brought to

Norfolk and was detained or just shortly after Americans – is he still of importance to you in your intelligence operation?

MR. CLEMENT He is Your Honor, and I think there are two things that are worth keeping in mind with respect to that fact. One is that it's not just a matter in dealing with it with a situation that's fluid as the ongoing efforts to deal with al-Qaida as simply interviewing somebody, getting them all the information they have and then you're done with that person, because what has happened is that on a world-wide basis the United States and it's allies have come into contact with additional al-Qaida operatives, and every time the United States comes in contact or its allies come in contact with an additional operative who may have new information, then there's an opportunity to take that information and ask new lines of questioning of detainees in it's prevent ongoing process.

The other thing that I think is important to keep in mind that without sort of speaking specifically to Mr. Hamdi's situation in dealing with the al-Qaida and the Taliban, these are not individuals who are anxious to cooperate in the first [7] instance, but their willingness to cooperate may increase over time. So for both of those reasons I think that Mr. Hamdi in particular and many of the detainees in general are of continuing intelligence value. As you may have read in the papers it's also true that the United States has released a few individuals who were previously being held in Guantanimo [sic], because of a variety of factors including that those individuals no longer had intelligence value to the United States.

JUDGE WILKINS The decision to detain would rest on the designation of Mr. Hamdi is an enemy combatant. Mr. Mobbs is the one that's made that declaration and I see he's a special advisor to the Under Secretary of Defense. The policy, I don't know him I'm, I understand he's a fine gentleman I'm sure. Whenever you have visibility and accountability to the process and you have Presidential appointees who have confirmation designations. Mr. Mobbs is buried somewhat deeply in the bureaucracy. I'm just wondering in terms of the visibility and accountability of an enemy combatant process. Would it add to the visibility and accountability to have an Assistant Secretary or Under Secretary of Defense who was confirmed by the Senate make these designations? I'm just curious how you settled upon an official to make a designation with consequences which are to be serious for an American citizen?

MR. CLEMENT Let me take that in [8] a couple of parts Your Honor, first of all I certainly wouldn't want to denigrate Mr. Mobbs position because he is a special advisor to the Under Secretary of Defense and that is a very responsible and important position. But let me also say that I want to correct any misimpression that it's not really Mr. Mobbs himself who's making this determination, Mr. Mobbs was effectively summarizing the process that the administration or the military made in treating Mr. Hamdi as an enemy combatant. And I think there really were four separate stages at which a determination was made that Hamdi was an enemy combatant. The first of course was made by our allies the Northern Alliance when they originally seized him armed with a firearm. A second determination was made –

JUDGE WILKINS How do we know that?

MR. CLEMENT We know that, well for purposes of the record in this case we of course know that from the Mobbs Declaration. The Mobbs Declaration itself relays that information and presumably incorporates information from the Northern Alliance. I also don't, and I think that as Mobbs Declaration notes in Paragraph 9 of the declaration, those facts were also confirmed by Hamdi himself in interviews with the government.

JUDGE WILKINS Is it fair to characterize the Mobbs Declaration as a form of double hearsay [9] and the information was gathered from the Northern Alliance commanders in Kandahar and Mozar Sharif and respond to presumably the Americans said that he was turned over in Kandahar and then from there it's relayed to the Department of Defense officials in Washington? Are we dealing in essence with a form of double or triple hearsay here and if so why should we trust him?

MR. CLEMENT Well, Your Honor, let me say this first and I don't want to get into the details whether it's a double or triple hearsay, but I think we would can see that it is hearsay and I think the reason that you should credit it is that it is a sworn affidavit and a sworn declaration. And the point of the declaration is to provide Judge Wilkins with an overview of the decision-making process that the executive branch made in this case. And I think, as I was saying there really were four determinations here, the first made by our allies, the second made by U.S. ground forces on the ground in Shida Prison, the third determination made in Kandahar again by U.S. forces and then a subsequent determination made on the basis that these interviews with Hamdi only confirmed his status as

an enemy combatant. And I think that it's important to recognize that when you're talking about –

JUDGE WILKINS Who made the determination, it had to be a person or a committee or a tribunal [10] or group. Who made the last determination?

MR. CLEMENT The last determination I think was made by no one person because there was a series of interviews and in these interviews there's obviously a constant reassessment to make sure that somebody is of intelligence value, is in fact an enemy combatant and so that last stage was really part of an ongoing process. Now, the prior determinations that were made on the field in Afghanistan were made in each case by particular officers, I don't have that information here it wasn't provided in the declaration.

JUDGE WILKINSON In response to the question of whether it's double or triple hearsay you're saying that the enemy combatant designation was made at various points along the line initially in the field by numbers of the Northern Alliance and again in subsequent interviews during the course of these various transfers.

MR. CLEMENT That's exactly right and one of the things I wanted to make clear is that –

JUDGE WILKINSON It's not just one entity that's making the designation, the designation is made in various points along the line.

MR. CLEMENT That's exactly right, and I think that's going to be the pattern in cases in which you're dealing with a battlefield detainee.

JUDGE WILKINS Was Mr. Walker [11] Lindh classified as an enemy combatant?

MR. CLEMENT I think he has been treated by the United States government as an enemy combatant, but I'm not familiar with all the steps along the process, but for Mr. Lindh, but I think some of the early steps were very similar to the steps in Mr. Hamdi's case.

JUDGE WILKINSON Let me follow up and ask you, Mr. Lindh was of course, charged and prosecuted for specific criminal acts and Mr. Hamdi has not been charged. How does the government decide which approach to take?

MR. CLEMENT Well, I guess that the short answer would be that it's a classic exercise of prosecutorial discretion, and I don't know all the factors that went in to the various determinations, there may have been a number of factors that went into that initial determination with respect to each of the individuals. I guess the thing that I would stress is that the consequence Mr. Lindh faces as a result of being put into the criminal system, is quite different than the consequences that Mr. Hamdi faces Mr. Lindh after all has been sentenced to a substantial prison term, and if as Chief Judge Wilkinson suggests if there is an end to the hostilities in Afghanistan as determined by the executive, and Hamdi is treated as being relevant to those hostilities he may well in the end face substantially less time in detention than Mr. Lindh.

[12] JUDGE WILKINSON Let me follow up just a little bit on what my good colleague has said. I'm just concerned here about the equality of treatment and Mr. Lindh facing formal charges and getting an attorney, you have Mr. Moussaui a French citizen facing formal charges.

And in terms of the arrest of terror suspects in Portland, Detroit, upstate New York, they've all been charged. Very little misconduct doesn't meet the definition or doesn't meet the elements of some Federal offense, most obviously conspiracy. But who is to say about the equality of treatment if Mr. Lindh is charged and Mr. Moussaui is charged, and Mr. Hamdi is not, is something other than caprice at work?

MR. CLEMENT Well, certainly there's something other than caprice at work there Your Honor, and I think that this is an area in which Judge Wilkins even in normal domestic context, provides substantial deference to the prosecutors in exercising their prosecutorial discretion.

JUDGE WILKINSON But clearly they are not between prosecutions and in definite detention. I mean indefinite detention is simply not an option in the domestic context, does it speak for a lack of bail hearings and arraignments and a great many other things?

MR. CLEMENT Well, certainly that's true but of course, there are vastly different penal consequences to various ways of charging an individual. And [13] often times in that context the government will decide to charge an individual with a lesser offense or treat them in a different way because they're getting cooperation from that individual or they want to keep the prospect a more significant penalty as a possibility to sort of 'beat the stick' if you will, to get more cooperation. And those same interests are involved in dealing with individuals like Hamdi and Walker Lindh and I think it's important to give discretion to the executive branch to exercise it's judgment as to how best to proceed with each of these individuals.

And I did want to also Chief Judge Wilkinson just to finish a thought that I started with, I do think the battlefield detainee situation is slightly different than a situation as with someone like Mr. Territo where there is really a point in time where determination is made. And obviously in that situation the executive branch went to a higher level of accountability and in fact went to the highest level of accountability and had the President make the determination.

JUDGE WILKINSON Yeah, I understand that Hamdi, Mr. Hamdi represents fundamentally a different situations, umm, talking about the difference in executive discretion with respect to whether to charge someone or whether to detain them, I mean is that, umm, what is the limiting principle of this enemy combatant term. Is the term enemy combatant to be confined to those like Mr. Hamdi who [14] was captured on the battlefield or in your view in the term enemy combatant would be applied to the individuals who are arrested in an airport or arrested in the course of a domestic terrorist plot. Does the executive have the authority to label someone an enemy combatant who is over here in the United States plotting a terrorist act?

MR. CLEMENT Well, first of all I want to make it clear that I don't want to end up arguing a different case than the one before us and, –

JUDGE WILKINSON I know, I am interested in knowing what the parameters of the principle are because part of the concern the unilateral declarations of designations of enemy combatant status and the application of that to American citizens and – a very open ended principle, I want to know where the limits of it lie.

MR. CLEMENT And I certainly want to be helpful on that point I just wanted to also make clear that Hamdi in many respects the prototypical classical battlefield combatant. But I think, with the short answered question is that yes, it is possible for the United States to hold an individual seized in the United States as an enemy combatant. And obviously the Quirin case provides a case in point from the World War II context, and I think the important limiting principle in that context is affiliation with the enemy. And I think that there is a difference between an individual, like [15] the individuals in Quirin who affiliate themselves with the enemy forces and an individual that is just a purely domestic act of terrorism where there's no affiliation with enemy forces.

JUDGE WILKINSON Oh, and what's the source of the executive's authority to label someone an enemy combatant? It would come from Article II Section II and the Commander in Chief clause, but isn't the – aren't the powers of the Commander in Chief that nexus to the commander and to executives in the Presidents authority as Commander Chief much greater in the battlefield situation than, you know, civilian context because if the executive branch is acting to arrest somebody on American soil who's plotting a criminal act, doesn't that simply implicate the executives authority as a law enforcement, in the normal course of law enforcement whereas the battlefield detention is much more likely to activate the executives authority as Commander in Chief, in other words, what I'm wondering, as this is a contest moves from the battlefield to civilian society doesn't the constitutional context also remove from the Commander in Chief clause to the Bill of Rights and the Sixth Amendment and the other thing that are, we normally associate as part and

parcel or criminal prosecution. And that's not concerned here, to the constitutional basis or domestic arrest if whether the Commander in Chief laws stretch that far.

MR. CLEMENT Well, Your Honor, [16] those concerns are not implicated in this case directly but let me address those concerns by saying, I certainly think that you're right to the extent that you say that the Commander in Chief authority is an important font for the authority of the executive Branch to hold enemy combatants, and that that power is at its zenith when you're in a situation as we have before us here, of capturing a battlefield detainee abroad. On the other hand I think we also know from Quirin that even if that Commander in Chief power is maybe not at its zenith, with respect to the seizure of somebody in the United States, it still is implicated and it still provides a basis for treating somebody as an enemy combatant. And again the Quirin case has many parallels to some of the other situations that may trouble Judge Wilkins in that the individuals there came to the United States in civilian dress with intent to blow up war facilities in the United States, they were seized by the FBI in New York and Chicago and yet they were treated as enemy combatants and they were not treated as ordinary criminals under Title 18. So, I say that by way of trying to be responsive to your question but I guess I'll finish where I started which is by saying, that those concerns are not implicated in this case, and this case really involves the prototypical case of an enemy combatant seized abroad.

JUDGE WILKINSON In this case, in this case, does it make no difference to Hamdi as an American citizen?

[17] MR. CLEMENT Well, I think that it makes very little difference. I mean the main difference I think it makes is that as an American citizen Mr. Hamdi would have a claim to invoke Judge Wilkins jurisdiction even if he were held abroad, but the Supreme Court in Quirin, the 9th Circuit in the Territo decision have all made clear and the 10th Circuit frankly in the Co Paw decision, have all made clear that citizenship is not a despositive factor or does not really influence the enemy combatant determination.

JUDGE WILKINSON If that was the case why was Mr. Hamdi removed from Guantonimo [sic] Bay, the executive must have thought American citizenship –?

MR. CLEMENT It may make a difference with respect to access to the American court system and so in that sense it may have made no difference from Hamdi's ability to file petition, whether it were held in Guantinomo [sic] or held in Norfolk but the government made that decision for a variety of reasons and brought Mr. Hamdi to the United States. And I don't think that decision is an odd one at all, in the sense that this is one of the major concerns in holding enemy combatants, and the reason that there's a long established authority to hold enemy combatants is precisely because you want to get them away from the battlefield so they cannot be in a position to aid others in the battle against United States Forces. And so there's been a long tradition of holding [18] enemy combatants, prisoners of war in the United States, in fact, in World War II I'm told we held over 100,000 POW's in United States Territory.

JUDGE TRAXLER Let me ask a question, in your brief you said 'transfer of an enemy combatant to the

United States – affecting the purely legal challenges', can you tell me what you're referring to and how that would affect – ?

MR. CLEMENT Well, I think like you said, one thing that it would affect is perhaps the ability to get into court in the first instance if the individual were not a United States citizen.

JUDGE TRAXLER What do you mean by in the court?

MR. CLEMENT Well, it's well established in Supreme Court precedence, specifically the Isentrader decision, an alien enemy held abroad does not have access to the United States Courts and indeed does not have an ability to bring a habeas petition. So I do think geographic locus may make some difference in that context.

JUDGE TRAXLER – effects the legal challenges and to the analysis of legal challenges?

MR. CLEMENT Once you get beyond that to the merits I suppose one might be able to imagine a situation where there would be an argument that, say [19] a substantive due process or procedural due process claim where in some kind of balancing the fact that the individual was in the United States might conceivably make a difference, I'm not sure I have a ready example. I think the point we were making in the brief though is even if you could imagine that it might affect the legal analysis, it's entirely inexplicable to me why it would affect the factual analysis. And so it's odd in my judgment that petitioners have effectively conceded and the District Court recognized this that the detention of Mr. Hamdi in Afghanistan did not raise a due process problem. It just seems to us

and I think the principle point in brief was if his detention doesn't raise a due process problem in Afghanistan, and there was a factual basis to hold him in Afghanistan, where does it become any less an enemy combatant when he's transferred to Guantonimo [sic] or in turn to Norfolk.

JUDGE TRAXLER Let me switch gears for just a second, one of the things that obviously concerns the petitioners is the fact that he is being held incommunicado and solitary confinement in a way he's not being accorded the rights that prisoners of war have. Is there a process within the military system for a prisoner or someone that can challenge this classification?

MR. CLEMENT Well, in certain circumstances in the other conflicts for example, there has been an opportunity to challenge whether one is properly held as a [20] prisoner of war or one is entitled to prisoner of war status. That's the Article V determinations you may have seen discussed in the briefs. But that's not been available in the current conflict because the President himself has made a determination that the nature of the way that the Taliban and the al-Qaida are pursuing the war in Afghanistan, means that as a group none of those individuals will qualify for prisoner of war status. And so that highly accountable Presidential determination has effectively served the same purpose as those Article V tribunals would in a different conflict.

JUDGE TRAXLER Your position is that it serves the same practical purpose? Is that the justification why he would not be entitled to have his determined by a tribunal?

MR. CLEMENT Well, functionally it serves the same practical purpose in as a more formal legal point,

that's also the Presidents interpretation of the Geneva Convention that he has satisfied the Article V requirements by making this overall determination about the status of the Taliban and the al-Qaida. One thing I think that is important just as a footnote to know about the Article V proceedings is that it traditionally doesn't function as a means of trying to figure out exactly what happened, or trying to figure out whether somebody is properly being held by the military at all. It's primary function is the language of the convention makes [21] clear is you have somebody who has admittedly committed a hostile act and then the determination is does that person qualify for the privileges of a prisoner of war. And since the President has made the determination that none of the al-Qaida, none of the Taliban qualify for prisoner of war status.

JUDGE WILKINSON Part of the determination – I understand it to be your position inside a Federal Court lacks the authority to award an Article V determination of what the Geneva Convention – authority. That is what I understand your position to be?

MR. CLEMENT It is our position Chief Judge Wilkinson, I'm saying that it hasn't been terribly robustly briefed in this particular case because the petitioners as opposed to Amica [sic] have never raised any challenge to the fact that he hasn't got –

JUDGE WILKINSON I want to get your position straight. As I understood your position with respect to Article V, was number one, that the President has made a determination that we were unlawful combatants, and as unlawful combatants they were not subject to Article V. Let's suppose now that's disputed and the opposing side

says how do we know that. I mean, I understand your position at that point and I just want to make sure that what I haven't strayed because the Amici flushed it out more than – than your brief did. That the tribunal would make a POW determination under Article V, [22] was not necessarily an Article III Court.

MR. CLEMENT Well, that's absolutely right Your Honor, – right.

JUDGE WILKINSON But for starters and the second point I understand your position to be the Geneva Conventions are not self-executing, and as a third point I understand your position to be even if they were in some way self-executing there's no indication that they are self-executing by virtue of a petition filed under 2241, umm, but I just wanted your perspective of the argument that can be – I just want to understand your position with respect to Article V. Is that an Article III court wouldn't make that determination and it would certainly not make that determination, that determination could not be set in motion by 2241 petition.

MR. CLEMENT I think all of the above is true and I would just emphasize again, as you said, it would be our position that the Geneva Convention is not self-executing with respect to Article V and that's, again we didn't get a chance to brief because kind of a quirk in the briefing schedule in this case and Amicus briefs in support of the appellees were filed after we filed the reply brief.

JUDGE WILKINSON That's why I just wanted to make sure that I understand your position because the Amici actually went into a greater extent that you had the opportunity to.

[23] MR. CLEMENT Right, no, that is our position. The only other additional point I would make which is really just a refinement of one of the points you make, is that we think the Geneva Convention provisions are not self-executing treaties and therefore not enforceable in habeas. But then we would also take the position that the Presidents determination that this overall treatment of the al-Qaida and the Taliban sufficed to take care of our Article V obligations, we think would be entitled to deference in and of itself, even if the treaty were self-executed.

JUDGE WILKINSON I'd like to ask you one little final question -- broader here. We're in the struggle I think, obviously over safety and security for American citizens and certainly that fundamentally. What we're also in the struggle to fight to preserve our own values, our own way of life and the Bill of Rights is right at the core of that when for whatever reason one argues to suspend the Bill of Rights and his application to an American citizen is not a step that is likely taken. We apply the Bill of Rights to the worst fanatics and the worst of those who are the worst traders, the worst spies, or even those who take actions which are fundamentally treacherous to country. But your opponents say that in suspending the Bill of Rights we are, this application to an American citizen we're in danger of losing our way and undercutting the very values for which those dislike us. Just [24] hold back for a moment and give me your thoughts and don't give me a pad [sic] answer but how does what is happening to Mr. Hamdi consonant with basic American values as they are expressed in our constitution. I understand how they are consistent with our values of safety and security, but how

long, is this consistent with our values of Liberty and Freedom, tell me that?

MR. CLEMENT Well, I mean I appreciate the question and frankly I appreciate the opportunity to respond to any suggestion that the Bill of Rights is in any way been suspended is in fact, neither the writ of habeas corpus nor the Bill of Rights has been suspended in this area. But it's also, I think very important to know that the Supreme Court in all sorts of context has made clear that the Bill of Rights in the particular provision an issue in the petitions filed by petitioners, the Fifth Amendment has by, it takes its reference point from history. And for 200 years it's been clear that the government has the ability to protect its individuals and protect society and hold and detain individuals in the context of ongoing hostilities. And so there's nothing inconsistent with exercising that executive authority and the Bill of Rights. And in particular I think that it would be a mistake to suggest that somehow this is a new erosion of rights because the Quirin decision made clear over 50 years ago that the government does have the authority to detain enemy combatants, and that case arose in the context [25] which I think you suggested is even more problematic from a Liberty standpoint which is, individual seized domestically in the United States. And yet for over 50 years since the Quirin decision those principles that are actually 150 years older than Quirin have lived, coexisted peacefully with the Bill of Rights and so I really don't think that there's anything inconsistent with the authority that is asserted here, was asserted 50 years ago in World War II and has been asserted in every major conflict in United States history, and the Bill of Rights which has also been around for 200 years.

JUDGE TRAXLER In the Quirin case these saboteurs were charged and they were afforded attorneys and the right to speak and that's a far cry different than the treatment Mr. Hamdi has received.

MR. CLEMENT Well, I think that the important –

JUDGE TRAXLER – It's like the Quirin decision and I keep wondering about the military and the lawyers they had and what about the other rights they recorded. You know of any case other than perhaps the Pedia case where individuals were confined under the same circumstances as Mr. Hamdi?

MR. CLEMENT Well, I guess I would say with respect to Quirin, the critical difference I think is not just that it was in front of a military commission or they [26] were given lawyers, but I think that the critical distinction is the government in that case sought and obtained with respect to six of the eight individuals, the death penalty. And again I think that's the fundamental difference, in Quirin an entire line of cases recognizes that in dealing with the enemy during war, there's more than one option for the Executive Branch and for the military authorities. If they want they can hold the individuals and hold them until the end of the hostilities, to detain them, to keep them from the battlefield and to gather intelligence. They also wholly independent of that have the option of charging them with specific war crimes. And of course historically all war crimes were punishable by death, and so that's a very different regime and I think the consequences are very different. And no one suggests, certainly no one in the executive branch suggests that if at a point Mr. Hamdi, Mr. Territo or some other individual is, if a

decision is made to try to prosecute them for particular war crime, there's no suggestion that they wouldn't have counsel to defend them in that type of prosecution. But that's simply a very different situation than you have with the authority to detain individuals for more preventive purposes during wartime.

JUDGE TRAXLER Can you think of any circumstances where somebody who is classified as an enemy combatant – shouldn't be given an opportunity – .

MR. CLEMENT I'm not sure that I [27] can think of, no one case comes to mind but that's not because there's no possibility that any enemy combatant could ever make a sufficient showing on habeas. It's more than I think you would likely see is I believe the proper focus is on what the governments showing is or what the governments evidence is. I can certainly imagine a case where the government said that someone was being held as an enemy combatant, not because they were seized on the battlefield but because they took steps that represent a violation of State Title 18 of the United States Code. And I think any court reviewing that would probably say, 'well, that's not a basis to hold somebody as an enemy combatant' and they would either issue the writ or give the government one more chance to come up with a reasonable basis for holding the individual and that would be the end of it.

You could also imagine that situation which I guess is similar where there's some legal defect in the theory under which the government is holding somebody as an enemy combatant. And I do think as we said in the briefs and I think was also made clear in the earlier round of briefing, that the principle office of the writ of habeas corpus in

these enemy combatant cases is going to be to mount legal challenges to the detention rather than challenge the specific facts, just because I think those factual determinations especially the ones made in the battlefield, are uniquely a subject to which Judge Wilkins owe substantial deference's. If there are no further questions.

[28] JUDGE WILKINSON

MR. CLEMENT No further questions. Thank you, Your Honor. Thank you.

JUDGE WILKINS Mr. Dunham, we'd be happy to hear from you.

MR. DUNHAM Good afternoon, Your Honors. We stumbled into this thing largely because we thought it was going to be a criminal case. When they separated Mr. Hamdi out from all of the prisoners down at Guantanimo and brought him back here as we read in the papers because he was a U.S. citizen, we assumed we were looking at another John Walker Lindh case and that's how we started into this thing and we had no idea what a 'can of worms' we were opening when we did that.

But I would like to call Judge Wilkins attention back to, what I would call square one which is Article I Section 9 of the U.S. Constitution which deals, which is often referred to as the suspension clause in which it says 'the privilege of a writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it'. Now there's been no suspension of the writ of habeas corpus and the right of Article III court to hear cases brought under that provision of the Constitution. And since 1867, the procedure in habeas corpus cases

has contemplated a petition, a response and a traverse that's the –

[29] JUDGE WILKINS I'm not sure how you can say that there's been an infraction of Article I or how the writ has in any way been suspended. This is the third oral argument in this appeal with extensive proceedings before the District Court, we've had thousands of pages or hundreds of pages of briefs and in a sense the process of this case has been greater than any 2241 case that I can remember. In view of all this attention and process and I don't think we've come to the conclusion that the writ has been suspended simply because you may not achieve a favorable resolve or because the writ may not be eventually granted, that wouldn't mean that it is somehow on that account been suspended.

MR. DUNHAM Well, it's Your Honor, it's like saying I have a car but I don't have any wheels. I mean there's an important part of the procedure in a habeas corpus proceeding and without this part it really isn't a habeas corpus proceeding. That's the traverse, Section 2243 sets forth that the applicant or the person detained may under oath deny any of the facts set forth in the return or allege any other material facts, that's part in parcel of what we think of when we think of habeas corpus. The petitioner says 'I'm unlawfully detained' the jailer comes forward and gives the grounds for the detention and the facts that support the detention, and then at that point the petitioner has the right to file a traverse. Without the traverse we really don't have a habeas corpus proceeding [30] here. And the government's position is that its factual response from Mr. Mobbs ends this case, and we say it basically for purpose of this case –

JUDGE WILKINSON You seem to indicate that the right to file a traverse is the right to have all of these facts that you may dispute litigated or resolved to the fullest extent.

MR. DUNHAM Well, the extent to which it may be litigated may be a question that will require as much attention as we've already spent on this matter. What I'm, uh, I think a footnote in one of the Amicus briefs filed by Baker and Hostettler in support of the government's position here to me is illustrative. It says quote "Hamdi however has not claimed that he was a member of the Northern Alliance either mistaken for a Taliban or set off for nefarious purposes by his colleagues". Of course he hasn't claimed that because he hasn't claimed anything in this case. Nobody's talked to him, nobody knows what his version of the facts might be. And what we're saying is somehow –

JUDGE WILKINSON But that begs the question doesn't it Mr. Dunham, because the question is whether the executive can detain without charge and whether the detention itself or the fact of detention in itself is lawful. And when you read the Quirin case it says by universal or it says lawful combatants are subject to capture and detention as [31] prisoners of war by opposing forces. Unlawful combatants are likewise subject to capture and detention. Why does the executive here lack the lawful authority to detain Mr. Hamdi? Why does this unlawful detention in any sense in view of the Quirin case and in view of Article II Section II?

MR. DUNHAM Well, Your Honor, first off Quirin doesn't say that a person who is being held as an enemy combatant has no right to file a petition for writ of

habeas corpus. Judge Wilkins asked a question when Mr. Clement was standing here, "Well, what circumstances could be raised that could challenge the designation of a person as enemy combatant" and Mr. Clement couldn't think of one. But the problem is it doesn't matter who it is, it doesn't matter under the procedures in the process that we're talking about here, nobody could challenge it. Because if the government came in with an affidavit saying 'the man is an enemy combatant', it's next case, he doesn't get to say 'but that's wrong that didn't happen that way'.

JUDGE WILKINS Let me ask you this just so that we're, what we agreed on you and your colleagues from the government. Am I correct in stating that you do not challenge the legality of his initial seizure and detention in Afghanistan?

MR. DUNHAM Yes, that's correct but it needs an explanation here. We believe that as was said in [32] Baker v. Carr, deference is not something, that is a product of reason and not a product of habit. But when you have a decision to detain somebody on a battlefield where it's dangerous and people are going to get killed if you make the wrong call, the highest degree of deference is due at that particular time. The further we get away from the battlefield, the further removed we get from a situation of danger and get back into our situation that we have here in the United States with courts open, a U.S. citizen, an ability to adjudicate the thing more carefully than a Sergeant can who may be ducking bullets at the same time he's taking somebody into capture, the less deference that needs to be accorded. Now, we are not saying that we agree that the initial detention decision was an accurate one, we're simply saying that it was illegal one.

JUDGE WILKINSON Mr. Dunham, I'm not sure I understand your point that less deference should somehow be accorded the executive depending on where it all took place. Where the prisoner of war, the enemy combatant is held. For example, the governments need to obtain intelligence which seemed to be just as important in Guantonimo Bay or in Norfolk as it would be in Afghanistan if intelligence is a long-going, long-standing, ongoing operation. In the dangers, we're speaking of danger, the danger of taking a battlefield scenario and relitigating it in court would appear to be just as serious in Norfolk or Guantanimo as it is in Afghanistan. With the danger [33] of diverting resources from ongoing conflict would even be greater if the forces in Afghanistan who were trying to litigate a case in Norfolk. It just seems to me that the National Security interest in safeguarding the confidentiality of intelligence don't simply disappear because the detainee is transported to Norfolk, so I'm really mystified as to why you the level of deference somehow evaporates or dissipates depending on the place or the location. I always thought the operative legal test was the one of duration of hostility and not the place of the location, that would be really introducing quite a few wrinkles in the law, would it not?

MR. DUNHAM Well, Your Honor, if I suggested that the place or the location was the 'be all' and the 'end all' of the determination I misspoke, because I didn't mean to suggest that. Clearly the fact that there was an emergency, a state of emergency with regard to Afghanistan and the Taliban at the time that Mr. Hamdi was initially taken into detention. And the fact that there is not now such a state of emergency with regard to Afghanistan or the Taliban would be a material factor in determining how

much deference you're going to give to an executive decision to continue to detain him, what –

JUDGE WILKINSON Are we going to get into the balance with the state of emergency in Afghanistan and with the extensiveness of the procedures here?

[34] MR. DUNHAM Courts don't do that they look at the proclamations of the Chief Executive to determine what the situation is. And the President has said that the state of emergency with Afghanistan and the Taliban is at an end. He said it in the middle of this proceeding on July the 2nd is when he made that proclamation and I respectfully suggest that courts should be guided and should give deference to what the Chief Executive says about the state of emergency with respect to the Taliban and the Afghanistan situation, and that that does have a bearing on how much deference you give to a military determination to continue to hold somebody.

JUDGE WILKINSON You say that the Article I Section 9 of the writ of habeas corpus is dependent on your ability to file a traverse. How far should we go in challenging all this, um, do you think the District Court was correct in ordering the government to produce material in its August 16 order, is that your view?

MR. DUNHAM I believe that the District Court concluded that the Mobbs Declaration was not enough, it was at least –

JUDGE WILKINSON Mr. Dunham, I ask you determinately I want to know how far you're prepared to go in challenging the governments designation. The District Court in its August 16 order asked for all the interview notes with Mr. Hamdi to be turned over, wanted

the names and [35] addresses of everyone who interviewed Hamdi. Wanted the names of the Northern Alliance forces or statements of the Northern Alliance forces. Always a part of challenging this enemy combatant designation in your judgment was that a proper exercise of discretion?

MR. DUNHAM Well, I believe that that request could have been trimmed back some, but I definitely believe that if you have statements out there for Mr. Hamdi that have been taken and that Mr. Mobbs is relying on for his affidavit there's no reason why those statements, which I understand are not classified for National Security reasons couldn't be produced in the case. And why they wouldn't go a long way towards helping to resolve this matter.

JUDGE WILKINSON If we require statements and notes of interviews to be produced before District Judges, as a general matter, aren't statements and notes of interviews with detainees likely, what do they do to this case, I'm not sure, but aren't statements and notes of interviews likely to contain the most sensitive intelligence information, the very things that underline the detention in the first place?

MR. DUNHAM Well, I Your Honor, it's very well possible that they could, but we understand here that the District Judge was limited to the Mobbs Declaration, he really wasn't supposed to be considering anything except that. And in the Mobbs Declaration he doesn't [36] say anything about any intelligence value for Mr. Hamdi or that his statements would contain intelligence and therefore can't be revealed to the District Court. I mean it seems to me that if you're go –

JUDGE WILKINSON I'm talking about the production order of August 16th which incorporated the production requirement for July 31st. And the difficulty I'm having with it is, if we set a precedent that said the District Court in its discretion in asking for those interview notes and statements to be turned over, you know I don't know of any detentions, I don't even know where the plans are with respect to Iraq or I don't know how many detentions will result from that conflict, and if those detentions, if those detainees, if those statements from the detainees gave as a result of some precedent we set, we'd be subject to production in Federal District Court. Well, I'm concerned about that because I think the statements of those detainees and the notes of those interviews are likely to contain highly sensitive information of great value for our forces in the field, and so I'm really concerned about the kind of precedent that August 16th order says. We haven't gone through all the different parts of it but just initially in asking for those statements to be turned over to the, do you understand the basis of my concern?

MR. DUNHAM Yes, Your Honor, I believe that we're not talking about a floodgate situation here [37] because we're only talking, this would only apply to a U.S. citizen. An enemy alien couldn't open up his files and get a U.S. District Court to undertake a habeas corpus proceeding on him. Mr. Hamdi as far as I know, is the only person out of all the detainees that were gathered up on the battlefield in Afghanistan that's in this particular situation. We're talking about a U.S. citizen, one person not hundreds and thousands of people asking for their files.

JUDGE WILKINSON We don't really know again, I still have no idea what happened in another

country in another conflict. It's not inconceivable that a great many captives were taken that there would be a number of U.S. citizens among them, that's not impossible. I'm worried about the Presidential value here of the materials they would require. For example, another thing that was required is statements by members of the Northern Alliance and what does this say about our ability to fight a war with the help of allies. Everyone agrees that fighting a war with the help of allies is a good thing, but if this August 16th order stands and our allies happen to capture somebody or it could be Britain or Turkey or any number of countries could come upon an enemy combatant in the course of a foreign field war. If we upheld this August 16th order, the British commanders and Turkish commanders and others who joined us in any fight, would be subject to having their statements produced or their depositions taken in a Federal [38] judicial proceeding and where does that go? In other words, what I'm concerned about is being drawn in step by step, increment by increment into something that's damaging to the operation of the Article I and Article II war-making powers. I'm worried about wading in over my head with these production requests and these document requests. The interview notes, the statements by the members of the Northern Alliance trouble me, could you put my mind at rest about this?

MR. DUNHAM Well, I can tell you that the statements of Mr. Hamdi are not classified, a U.S. District Judge in the Eastern District of Virginia has already seen them, Judge Ellis in the Lindh case and the lawyers for John Walker Lindh have seen them. Now it seems to me that if the government has already shown those type of statements and used them in a criminal case, that there

can't be any harm to the Republicans showing them to Judge Doumar down in Norfolk.

JUDGE WILKINSON And they did make them public?

MR. DUNHAM No, they're under a protective order for use only for the purposes of litigation in the John Walker Lindh case. But of course, as soon as John Walker Lindh's lawyers saw those statements by Mr. Hamdi the first thing he wanted to do was see Hamdi. He called me [and] said "I want to see Hamdi, you're his lawyer can I see him?" I said, "I can't even see him, how can I get you in to see him?" [39] but the fact is –

JUDGE WILKINSON Is it your judgment that the materials that the District Court requested should be turned over in camera and redacted?

MR. DUNHAM My belief is that these are things that can, are best worked out at the trial court level. It's my judgment that if the government felt that giving up statements of the Northern Alliance was a problem, that they would go to the Judge and they would say 'this is a problem and here's why' and that documents would be redacted to protect National Security information, I'm going through this to fairly well in the Hamdi case right now, thousands and thousands of classified information regarding the War on Terror and we're able to deal with it. All they have to do is redact it, the information is not relevant to the detention of Hamdi –

JUDGE WILKINSON Right, well then you say that this should be, that this could be submitted in camera?

MR. DUNHAM And it could be submitted not only in camera but it could be Judge Doumar ordered it submitted Exparte [sic], now –

JUDGE WILKINSON Well, then that leads me to a whole another set of questions, because if this could be submitted Exparte [sic] and in camera and is subject to redaction, we're going to have a whole set of secrecy issues and [40] a whole different set of legal disputes. For example, you're already quarreling in your briefs over what the scope of the redaction request was. I don't know if we'd be quarreling over the scope of redaction, and as you know from cases in the Sixth Circuit or Third Circuit dealing with the secrecy of, or openness of degradation hearing, cases in the D.C. Circuit meeting with whether the names of detainees need be disclosed. If we upheld the August 16 order we'd be creating a whole pantaplave [sic] of secrecy issues and disclosure issues around this litigation. The very things that are now being litigated as a collateral matter in all of these other circuits isn't it? I mean isn't it better to have whatever decision is made in Hamdi's case at least be made out in the open and if Judge, the District Courts order seems to presage a path of Exparte [sic] communications in chambers or in camera conferences, that's going to lead to doubt and suspicion and all kinds of things, all kinds of disclosure battles, ongoing disclosure battles. Why would we ever go down that path?

MR. DUNHAM Well, Your Honor, my brief is, is that should have been and I argued this to Judge Doumar, that should have been avoided by simply finding a way to allow Hamdi to see the Mobbs Declaration and comment upon it as to whether he disagreed with it in any particular, whether there were any additional facts that he'd like to call to Judge Wilkins attention. It doesn't have to be in

an unmonitored meeting with counsel type scenario, there have to [41] be creative ways –

JUDGE WILKINSON To do that he'd have to have counsel?

MR. DUNHAM He would or it would have to be done through counsel of course, Your Honor, and it could be with a military guard sitting there that I meet with him, I show him the thing and say what have you got to say about this. But it seems to me that's the cleanest way, the most open way to give the public confidence that this is not a secret proceeding, to give the public confidence that the man had an opportunity to meet with a lawyer and to set forth his side of the case and to present that back to Judge Doumar. And it just short-circuits all of this stuff. And it doesn't seem to me to be a –

JUDGE WILKINSON What you're saying here is that this goes back into the fundamental right as a right to meet with an attorney.

MR. DUNHAM I'm saying that it's all wrapped up, inextricably intertwined with the habeas corpus right. If habeas corpus is to mean anything, it means that the man has to be given an opportunity to confront the allegations against him and it means that he should have counsel in order to do that.

JUDGE WILKINSON – If he should have counsel Mr. Dunham in the normal case counsel is going [42] to advise the client to be quiet I don't but I think that's counsels job and I respect counsel for doing that but that means the only way that the United States of America is ever going to get intelligence out of the detainee is through plea negotiations or negotiations over a grant of

immunity, and doesn't this strike you as an odd circumstance to have our government negotiating with the enemy and battlefield combatants over pleas and immunity grants I mean what – does any other country or have we in the past required the executive branch to negotiate with people who have taken up arms against the United States to enter plea negotiations and immunity negotiations in order to gather intelligence. And that's, once again I'm worried about getting drawn in to some very deep waters.

MR. DUNHAM Well, I can understand that Your Honor, and all I can say is that I completely, one of the things that's been bothering me about all the press reports since 9/11 is the notion that when lawyers go in there they cause the client to shut up. That's not necessarily the case often times counsel can promote a situation where the person begins to talk when he wasn't talking before. As we sit here right now we –

JUDGE WILKINSON We've increased your leverage in plea negotiations and increase your leverage in immunity proceedings, you'd want to hand over as little information as possible and that means that our intelligence [43] gathering efforts would be seriously impaired.

MR. DUNHAM But of course, if they were intending to prosecute the man Your Honor, they shouldn't be, if there's any thought that they're setting this man up for prosecution they shouldn't be in there interrogating him to get information which they would then use against him in a criminal case. This is not that context, this, we're not in a criminal case here we're in a civil habeas corpus proceeding and the meeting that I'm suggesting wouldn't have to necessarily be a one on one attorney client privilege meeting, although you would get the best result you

get the most confidence from the client, he trusts you the most if that was the setting in which it occurred. I mean you go in there with the military guard sitting there he might not feel free to speak his mind on the true circumstances of his capture. But I do believe that the concern that you expressed with regard to the scope of the District Courts production order would be solved, if we could get Mr. Hamdi to just speak and find out if we have any factual differences. Then Judge Wilkins could focus in like a laser beam on those issues where there are factual discrepancies, if in fact there are any. Now I know that during World War II, the only case that's reported that's even similar to this case is the Territo case, where the man challenged his status as an enemy combatant, as a prisoner of war, he was a U.S. citizen, he was being held in California. And he filed a [44] habeas corpus case and the whole case is eerily similar to this one. And I have the transcript of it and he had a lawyer and the government produced live witnesses and there was cross-examination and there was testimony, and there was argument to the jury and we still won World War II. So, what I'm trying to say is that we're to a certain extent we're blazing new ground certainly in the Fourth Circuit, but what I'm trying to say is that 56 years ago a District Court in California dealt with the exact same kind of case as this, where a gentleman was trying to contend, 'you know I was grabbed on the battlefield, yeah I have partial Italian uniform on, but I wasn't an enemy combatant I was forced into labor, I was working with them', and that issue was litigated in a U.S. District Court and the, uh, both sides had counsel, the government didn't send in a two-page declaration that left open more questions than it answered, it brought in the Provost General to testify. An official of sufficient rank came in and testified and was

cross-examined and when it was all over the District Judge said, 'yeah, he's an enemy combatant he can be detained' and it was over, it was over like that.

JUDGE WILKINS So you're saying in this case if you were at such a hearing as Territo had and the Judge said, "you're an enemy combatant and – and – I'm still going" then you would concede his detention is lawful?

MR. DUNHAM That's fine, we're [45] not saying that the United States cannot detain enemy combatants with –

JUDGE WILKINS – Judge Doumar's findings he was in Afghanistan, he was with the Taliban, he went there to fight, he had a rifle, are we to credit any of the statements or findings that Judge Doumar had?

MR. DUNHAM Well, it'd be, only if you credit all the statements he made I mean uh, I think that the bottom line is those statements were made based on a one-sided presentation of facts that we've never had a chance to respond to. And that there shouldn't be any factual findings until you have a complete record and a complete record which should include some input from the petitioner.

JUDGE WILKINSON When you use phrases like factual discrepancies or complete record, isn't the only way to resolve the factual discrepancies because there are always going to be denials of one's status as an enemy combatant, I mean isn't the only way to resolve those by deposing commanders in the field? Judge Doumar asked at the August 13th hearing he said, "has this man ever fired a rifle?" Well, how can we, whether he fired a rifle may be

important or germane in his status as an enemy combatant, and yet to make that determination wouldn't we have to step so far out of our shoes as Judges and bring battlefield scenarios back into Judge Wilkins room and depose American commanders in [46] the field and depose members of the Northern Alliance to sort of determine the status with real certainty. Because good lawyers are skeptics by nature and that's one of the reasons I admire them so much, they should be skeptics and beyond a reasonable doubt requires that they be skeptics, but this is a totally different context. We're talking about a foreign theater of conflict and it's not a crime that was committed in Norfolk, it's not a crime that was committed in Richmond or anywhere in the venue. And I would think the burdens on the military would be considerable to be litigating the circumstances of the capture half way around the world. The litigation then would be taking place in Afghanistan, we're going to have American commanders in Afghanistan or Iraq or some other place litigating a case in Norfolk. So it gives us some sort of judicial process in Norfolk even if it's no more than a deposition. Apart from the time that it takes, aren't the logistics of that kind of situation going to be difficult to manage?

MR. DUNHAM It would depend on the nature of the factual dispute if there even was one.

JUDGE WILKINSON You know there's going to be one don't you?

MR. DUNHAM I note, no, there can be one but let me just say Your Honor, before I notice that my times up can I make a –

JUDGE WILKINS You get Mr. [47] Clement went over you get to go over to.

MR. DUNHAM I wanted to touch on a couple of additional points. One is, when you asked me about what, why did the geographical location make any difference. I believe that the geographical location does have some degree of difference because once you bring Mr. Hamdi, who is a U.S. citizen into the United States you suddenly have to confront 18USC4001(A), now we've addressed that in our brief but it talks about no U.S. citizen it doesn't say no person, so it's directed solely at U.S. citizens, and it says 'no U.S. citizen may be held or detained in any way except by act of Congress' and we would respectively submit that the architects of the conflict between that statute and Mr. Hamdi's current detention is the government when they moved him here, precisely because he was a U.S. citizen. I still don't understand in my own mind why it was the military brought him here thinking it would have some effect on his legal status, we believe it does we believe it brings him right in the cross-hairs –

JUDGE WILKINSON If we have taken your reading of the statute wouldn't that prohibit the detention of enemy combatants that would have to be American citizens even in Afghanistan as long as the agent of detention was the United States it would be an impermissible detention according to your reading of the statute.

MR. DUNHAM – Your Honor, my [48] reading of the statute and my reading of the case law is that exterritorial application of the statute is not to be presumed and that courts of course would most –

JUDGE WILKINSON – we'd be lost – on the statute if we did that it's just your reading of the statute is

that no citizen should be imprisoned or otherwise detained by the United States, if we take that language as you want us to take it it would prohibit even the capture or detention of an American citizen in Afghanistan?

MR. DUNHAM This is without charge and there, when you have an American citizen taking up arms or acting in conjunction with a foreign power, there are plenty of statutes that Congress has authorized that he can be charged with. All that statute says is that you got to charge him, you can't just detain him without charge. So, I wanted to correct that point.

JUDGE WILKINS – 4001(A) before?

MR. DUNHAM Well, I believe Your Honor, that if you consider that the issue of whether or not the case should be dismissed at this point is before you than 4001(A) is, but if you're limiting your review –

JUDGE WILKINS – we're not –

MR. DUNHAM But if you're limiting your review right now to simply whether Judge Doumar appropriately ordered production from the government, [49] and whether or not the Mobbs Declaration is adequate to support the detention, if that's all that you're considering at the present time then 4001(A) is not before you.

JUDGE WILKINS What can we consider at the present time under the appropriate – ?

MR. DUNHAM I think under the, under 1292B the appropriate issues before you are whether or not the Mobbs Declaration standing alone and without any other information is adequate to support the detention. And second, whether or adequate to provide opportunity for

meaningful judicial review, and second, whether or not if not, whether the production order that Judge Doumar entered was an appropriate exercise of discretion on his part in trying to get additional information that would make him comfortable that he was providing meaningful judicial review to the petitioner.

JUDGE WILKINS There are other issues alleged by you one is the 4001(A) issue and the other is the cessation of hostilities, is that correct?

MR. DUNHAM That's correct.

JUDGE WILKINS Those are two basis [sic] on which you say Mr. Hamdi should be released.

MR. DUNHAM That's correct.

JUDGE WILKINS Have either of those issues been addressed by the District Court?

MR. DUNHAM And neither has [50] been yet addressed by the District Court. We asked them to, we asked the District Judge to address those issues so that when we came up here on the certification everything would be before Judge Wilkins but he declined and those two issues still remain untouched by him.

JUDGE WILKINS We said in our earlier decision that if he is adjudged to be an enemy combatant then his detention is a lawful one.

MR. DUNHAM Your Honor, I don't believe that you said adjudicated to be, I believe Your Honor said if he is an enemy combatant then the detention is lawful. And that begs the question because we still don't know whether

he is an enemy combatant or not. That is the $64 dollar question that remains to be answered.

Now, I would just like to close by saying that a decision made on a battlefield as to whether a person is an enemy combatant under exigent circumstances and without the exacting fact-finding procedures of a court or even of a military tribunal is entitled to the highest degree of deference regardless of the likelihood that it may be factually flawed. Because of the circumstances under which it is made. Almost a year later in circumstances much less exigent where the emergency that was being addressed at the time of capture, by the Presidents own declaration has been ended. And we're concerned for accuracy in the determination can be given more consideration. There is [51] no need to give the same degree of deference to the initial battlefield decision.

To allow an American citizen, captured on a foreign battlefield but now in the United States, to avail himself of the statutory procedures ordinarily available in habeas corpus proceedings is not a floodgate opening process. Nothing in the Mobbs Declaration suggests that there would be any harm to or interference with military or National Security efforts to follow these time-tested procedures for habeas corpus cases that are a hallmark of our Liberty. And while I have nothing but praise for the current administration in its efforts to combat terrorism, the precedent it wants to set here, while perhaps expedient for the moment has long-term potential for incursion on our liberties and it should be rejected for that reason. Thank you Your Honor. I'm sorry Your Honor.

JUDGE WILKINSON Judge Traxler has some questions for you. Mr. Dunham, I'm curious about where

this hearing is headed in the District Courts so what I'd like you to do tell me if you had your way and you got everything you wanted, how do you see this hearing in the District Court evolving?

MR. DUNHAM Well, if I had my way and I got everything I wanted Your Honor, I'd be allowed to take the Mobbs Declaration over to Mr. Hamdi and he would read it and he'd say "Yep, that's right everything in there's [52] correct" and the case would be over, but life is not that simple.

JUDGE TRAXLER Give me your worst-case scenario.

MR. DUNHAM Worst case scenario is I take it over to him and I show it to him and he says 'I didn't have a rifle and I had already decided to join the Northern Alliance but I got in an argument with a buddy there and the next thing I know I was turned over to the Americans as a captured Taliban, which I never was'. Ok, he says that exactly the scenario hypothesized by one of the Amici in their brief, at that point I believe that the District Judge is going to have to conduct a factual inquiry. He's going to have to hear testimony.

JUDGE TRAXLER All right, he's going to hear testimony on these statements that Hamdi will testify?

MR. DUNHAM I would expect at that point if he was disagreeing with Mr. Mobbs that he would either testify or be allowed to file an affidavit, or bring his views before JUDGE WILKINS in some manner or fashion.

JUDGE TRAXLER What's the government going to do? How are they going to present the evidence?

MR. DUNHAM Government's going to cross him. Government's going to do what they did in [53] the Territo case, they're going to bring in government officials who may, some may have personal knowledge of the situation, some may be testifying from hearsay. It's in that context that I would give the executive maximum deference to avoid inconvenience, to avoid interference with the government functions but still require them to come forward and in some way answer what Mr. Hamdi asserts.

JUDGE TRAXLER But ultimately the District Judge in your scenario is going to have to make a credibility determination as to who's telling the truth, is that right?

MR. DUNHAM They may or may not have them because –

JUDGE TRAXLER – Let's take worst-case scenario.

MR. DUNHAM Worst case scenario.

JUDGE TRAXLER And Hamdi says 'I didn't have a gun I didn't shoot anybody, I'm not in anybody's military' and the military says 'yes he was he was shooting', just like a worst-case scenario. Ultimately in your view the District is going to have to make a credibility determination. One persons telling the truth and one is not, isn't that correct?

MR. DUNHAM Yes, and that consistently happens in habeas corpus cases.

[54] JUDGE TRAXLER So under your scenario it could happen a Judge could say 'I just don't believe the soldiers so I'm going to order him to turn him loose and

take him back to Afghanistan and think about it or I'll take you back over to the enemy country where we're fighting. That would be the result ultimately of the situation that you –

MR. DUNHAM Except he's a U.S. citizen so he can be released here.

JUDGE TRAXLER So you would have Judges making credibility decision in judging actions taken by the military through the war and overruling their decisions?

MR. DUNHAM Only with regard to U.S. citizens. Not with regard to enemy aliens. I mean we're only talking about a U.S. citizen's right not to be held indefinitely without ever having an opportunity to confront the basis for the detention. And we're limiting it to that, I don't believe that we'd be opening up the floodgates to enemy aliens challenging the decisions of their captors on a battlefield Your Honor.

JUDGE TRAXLER All right, let me ask you along those lines let me ask you in that regard, if an alien is in the United States is he entitled to Constitutional – rights under the Constitution?

MR. DUNHAM Generally speaking yes, but if he was brought here as an enemy, as a [55] prisoner of war I'm not sure that that's the case. There are a line of cases out there that suggest that his presence here does not change his legal status and does not give him any additional rights. The U.S. citizen has the Constitution following him wherever he goes. But if you brought an alien here there are some cases that suggest that the fact that the military chose as a matter of convenience to hold the

prisoners of war here, that that would not open up the U.S. Courts on habeas proceedings to them.

JUDGE TRAXLER Your case is dependent on Mr. Hamdi being a U.S. citizen?

MR. DUNHAM Oh absolutely, I think if he was not a U.S. citizen we wouldn't be talking about this.

JUDGE TRAXLER What showing do you have that the military made and in your judgment and what's your position, what is it in regard to showing that there's a burden that the military and government have with regard to show adequate justification for – as an enemy combatant.

MR. DUNHAM Well, I believe that you first off would have to get the issues crystallized by the response, and then the government would have to show some evidence as to why Mr. Hamdi should not be believed. And in that context I believe that the weighing of the evidence problem should give deference to the government.

[56] JUDGE TRAXLER They're only required to show some element of why he shouldn't be believed, why would we go beyond looking at the governments evidence?

MR. DUNHAM Well, I don't believe in –

JUDGE TRAXLER There's been no evidence that he was an enemy combatant, I don't understand why –

MR. DUNHAM Well, I don't believe that the some evidence standard is appropriate because, there could be, we've had cases in the immigration context where they were relying on the some evidence standard.

JUDGE TRAXLER I understand you don't think that's right but I want you to tell me what is right, what you think the standard should be?

MR. DUNHAM I think the standard should be the preponderance of the evidence but with deference to the government. I mean, I think that a court should if you had a Sergeant testifying as to what he saw and you had Hamdi disputing it, I think that that ought to come down in favor [of] the Sergeant if it was that way. That's where I think the deference –

JUDGE WILKINSON – You think the preponderance of the evidence in response to Judge Traxler, [57] who would bear the burden in that case, the government would bear the burden would they not?

MR. DUNHAM In the normal habeas corpus case that's correct, the respondent bares the burden of justifying the detention.

JUDGE WILKINSON How can we satisfy their burden without calling American commanders either taking their depositions or calling them away from their battlefield or combat duties to answer a report because the most persuasive evidence that Judge Traxler points out is the credibility contest. If you refer those things as a swearing contest, you're not going to have Mr. Hamdi swearing against Mr. Mobbs, it's going to be the word of the battlefield commander before the word of the Northern Alliance commander against the word of Mr. Hamdi. Doesn't that just lead the battlefield right into the courtroom?

MR. DUNHAM Well, Your Honor, that's what they did in the Territo case but I would respectfully

suggest that it's our freedoms, they don't come cheap, they come often times with a lot of inconvenience. But when you want to detain an American citizen indefinitely there is some burden that comes along with that, and it all can't be swept away with 'well, this is inconvenient for the military", there's going to be some inconvenience. My suggestion is that it be minimized, that that's where the deference comes in, in this [58] process, affidavits, hearsay, ought to be admitted, documents could be introduced in lieu of live testimony. The shape of a hearing that would be held to resolve factual disagreements if there were any is something that is in my view, yet to be decided.

JUDGE WILKINSON It's not a question of whether or not the military is deserving of trust, that's a policy matter. It's really a question of where the Constitution locates the element of judgment and the Constitution doesn't locate in a wartime situation, the Constitution doesn't locate the ultimate judgment, the element of judgment within the judicial branch. It presupposes we have at least a modicum of trust in those who are Constitution or quote "consigned to the war making authority". It's not because they deserve it or they don't deserve it, it's because our Constitution reposes it in them.

MR. DUNHAM But it's not a political question, it is an issue that is reviewable by courts. Nobody has said that the writ of habeas corpus doesn't apply in a situation of an American citizen who is being detained indefinitely by the military. Go back to Judge Wilkins question, he asked Mr. Clement "Can you think of a scenario where somebody could challenge an enemy combatant status" I mean suppose it was an ABC newspaper guy that was photographing something the military didn't want him to

[59] photograph. So they called him an enemy combatant and they introduced an affidavit that this person was an enemy combatant, he was photographing National Security material and he wasn't supposed to be there, he's detained, he was on the battlefield. It seems to me the man ought to be able to say 'no, no I was there from ABC News, I had a press pass", or raise the First Amendment, whatever he wants to raise. But that would be impossible under the procedure that we're sitting with right now because he wouldn't be able to see a lawyer, wouldn't be able to bring his side of the case forward.

JUDGE WILKINSON Because you'd have every television station in the country breathing down your neck –

MR. DUNHAM Well, I'm pondering the ridiculous, but the ridiculous is often times what we have to look to to look at the consequences of what we're talking about here. The government is not talking about limiting the use of his power to the battlefield. They believe we're in a worldwide chase against these al-Qaida types, they want to be able to call any one of them an enemy combatant at any point in time and detain him without charge.

JUDGE WILKINSON Mr. Dunham, I think Judge Traxler may have some more questions for you.

JUDGE TRAXLER Your position is Mr. Mobbs position is apparently not the one that's most [60] adequate for you to accept – it's sufficient to justify detention. Who do you think or who should be the person or what rank should the person have in order to do that?

MR. DUNHAM Well, I think as a policy matter I think accountability when you're going to detain the

American citizen indefinitely is important. And if the administration thinks it's important enough to do that they ought to have somebody go out on a limb who has been appointed and confirmed by the Senate and has a reasonable position before that can happen.

THE COURT

MR. DUNHAM Well, you know Your Honor, it's hard to explain except that I know that a wiretap context they wanted the Attorney General on the authorization for the wire. It's because when you're entrenching on the Civil Liberties of American citizens you want accountability, you want political accountability, you don't want the decision buried so far down in the bureaucracy that a particular administration could just easily walk away from it.

Second, I don't believe that Mr. Mobbs is testifying at all, he's acting like a summary witness. He's coming in here with an affidavit saying, "I read this, I saw that", he's just simply reviewing the file and trying to summarize what's in the file. It seems to me that –

[61] THE COURT

MR. DUNHAM No, I agree, a Presidential appointee wouldn't do much different however, I would say that I setting forth the caveat that I don't think a declaration like that is ever adequate without hearing from the other side of the case, but if it could be it certainly would be more complete than the declaration that we got from Mr. Mobbs which for example, doesn't even explain why the man's in Norfolk, doesn't explain why he's in the Norfolk Navy Brig, doesn't explain anything about his current detention. Ok.

THE COURT

MR. DUNHAM That's correct and I don't see a problem with that. I don't see a problem with a hearsay declaration coming in to explain why the man's being held. My problem is in not being able to have the other side be able to review it and say whether or not it's accurate.

THE COURT

MR. DUNHAM Thank you Your Honor.

THE COURT

MR. CLEMENT Thank you, Your Honors, I'd just like to make a few points in rebuttal. First Mr. Dunham started out with emphasizing the need for a traverse and the need for a petitioner to be able to file a traverse. And it's a little puzzling because if you look at the joint appendix, [62] the traverse that they did file in the District Court and it's [sic] attachments cover a little over 60 pages of the joint appendix from pages 63 to 128. So, I gather that Mr. Dunham's objection is not so much that they didn't get to file a traverse, which they did, but is more broadly that this case didn't proceed like an ordinary habeas case. That there wasn't the same opportunity to bring in evidence, there wasn't the same opportunity for review. And it seems to me that this court made clear in its early opinion in this case, that this is indeed not an ordinary habeas case, that this arises is in a uniquely sensitive context and that the procedures need to be administered with a sensitivity to that context. And I think that the respondents, I'm sorry the appellees are really taking issue with that decision of this court. And in response to Judge Traxler Mr. Dunham made a variety of points about exactly how they would envision the proceeding taking place on remand. It's clear just from their brief on page 41 of their brief, that what they envisioned is in

fact a De Novo standard of review in the District Court. And that might be, that doesn't even seem like the standard that's usually applied in an ordinary habeas case. It's certainly not the standard that should apply in this uniquely sensitive context.

Another point I would like to emphasize is as a –

THE COURT

MR. CLEMENT Well, I mean, that's the habeas cases that we've come to be most familiar [63] with when there's a Federal habeas challenge to say a state criminal conviction. But of course the traditional office of the writ of habeas corpus involved other kinds of executive determinations where there hadn't been a full-blown trial like the extradition context for example. And yet they're still was just a some evidence standard of review, so I don't think there was really a precedent for a De Novo standard of review.

THE COURT

MR. CLEMENT Well, I certainly think it is Your Honor, and I think that's true for a couple of reasons. One is that the gist of the District Courts order was that the Mobbs Declaration was not sufficient to justify the detention, and it seems to me that tied up with that is the notion that the declaration and the Motion to Dismiss that accompanied it were not sufficient to resolve the case. And I think they are in fact sufficient, and I think that's true because –

THE COURT

MR. CLEMENT Well, because of the order itself, the August 16th order found the Mobbs Declaration

insufficient to resolve the case and so, as I say tied up with that is the notion that the Mobbs Declaration and the accompanying Motion to Dismiss are not sufficient, because if JUDGE WILKINS had made the alternative conclusion and said, 'the Mobbs Declaration is sufficient to resolve the case', then that would be the end of proceedings in the District Court.

[64] THE COURT

MR. CLEMENT That's right, or another way of looking at it is the Mobbs Declaration more than satisfies the government's obligation to provide some factual basis for its detention. But this case has always been about that factual basis and the legal challenges that petitioners have mounted to that detention.

THE COURT

MR. CLEMENT Well, I think that's right, I also think that the District Court, to be frank if you look at joint appendix page 423 when you have an opportunity, he actually viewed this courts prior decision as effectively resolving at least the 4001(A) question. He read this courts statement that 'if Mr. Hamdi is indeed an enemy combatant, then his present detention is lawful' to largely resolve questions like 4001(A), which as you recall were raised by petitioners in the earlier appeal.

I also would say that I think that if you think there's any question about whether they're fairly included, but you think this may be a case where it's close to the edge, then I would really urge Judge Wilkins to find this as a case where it is fairly included. Because I think there are independent virtues to having this case resolved. I think that having this issue, having allegations that the United

States is holding this individual without lawful authority, having those allegations in the air is [65] not helpful and the government's position is that, and I think the Fourth Circuit largely recognized, that this court largely recognized it last time around, that Mr. Hamdi is in fact being detained pursuant to the well-established authority of the Commander in Chief to hold enemy combatants. And I think it would be a benefit to everyone to have that issue definitively resolved.

THE COURT

MR. CLEMENT Well, Judge Wilkins, the cessation of hostilities issue was not directly implicated in the District Court proceeding but I think that may have come up at various points during the hearing. There is a sense in which the starting point for all of this should be the petition, and the petition only raised a Fifth Amendment issue and a suspension of the writ issue that was based on the November 13th Presidential order for military commissions. That latter claim has fallen out of the case because I think everyone understands that Mr. Hamdi's not being detained pursuant to that November 13th order. Now the petitioner's legal arguments have been something of a moving target, but if, I mean certainly the due process issue was raised and that I think was fairly before the District Court. And I think that again since the gist of the District Courts order was that the Mobbs Declaration was not sufficient and before we did anything else we're going to get all this additional evidence [66] that's contemplated by the production order. I don't see how that order is not consistent with the idea that he's rejected our Motion to Dismiss, I mean you don't order the production of all sorts of sensitive National Security information in additional evidence if you accept the governments Motion to Dismiss.

That kind of evidencery [sic] production order is inconsistent with, and I would suggest a defacto rejection of the Motion to Dismiss the government filed that did implicate all these issues, I mean I'd like to comment just on a couple of those issues. I think that idea that the war is over is just I think flatly inconsistent with reality, and petitioners rely on a few Presidential determinations to be an economic emergency with the Taliban regime has been suspended by the substitution of regime. That certainly doesn't seem like the fact that the United States is trying to help rebuild a Nation-State in Afghanistan is inconsistent with the notion that there are hostilities still ongoing there, because there very much are and the war unfortunately has not come to an end in Afghanistan.

With respect to 4001(A), Chief Judge Wilkinson you pointed out that one problem with that is that the statute by its terms may apply extraterritorially. Another problem with that seems to me is that the logic of their position means that the United States can never hold a citizen as an enemy combatant under the laws of war, under the Presidents Commander in Chief power no matter how compelling the showing, no matter [67] what procedures are afforded. Their view of 4001(A) is an absolute bar and I think there are plenty of reasons including the simple fact that it's located in Title 18 of the US Code, the fact that the very next subsection expressly exempts military facilities to conclude that's not what Section 4001(A) is all about.

THE COURT

MR. CLEMENT Well, I don't know if it's inconsistent with it –

THE COURT

MR. CLEMENT Well, I think they can, I think if you were to hold that 4001(A) had application in this situation, and so the executive needed to point to a statutory authorization for its authority to hold Mr. Hamdi I think the joint resolution of Congress might provide that kind of authority.

THE COURT

MR. CLEMENT Well, I completely agree with that and then my point would be but to the extent 18USC4001(A) prohibits detention without Congressional authorization, the joint resolution provides the necessary authorization.

THE COURT

MR. CLEMENT Well, I think that might be one way to look at it. Another way to look at it would [68] be that the statute itself provides the necessary authorization. But the potential conflict between those two provisions that you outlined, I think just reinforces what I think is the best and single best answer to this question which is if 400 –

THE COURT

MR. CLEMENT Well, I don't think that Congress would expressly avert and create an exception for something that they just didn't envision the statute reaching at all. And I think that even one of the sponsors, we point this out in our reply brief, even one of the sponsors of the legislation, then Representative Migva pointed out that there was no need for some kind of exception for the Presidential authority under the Commander in Chief power because Congress doesn't even have any authority to affect that in the first place. And so I think that may be

a better explanation for why 4001(A) doesn't have an express exemption of military detentions under the Commander in Chief power. I see my time expired so I'm happy to stop or I was going to make one or two more points but whatever Judge Wilkins would prefer.

THE COURT

MR. CLEMENT No, and that was actually one of points I was hoping to make which is, the Territo case, and the first thing to understand about the Territo case is that it is not a right to counsel case. Nothing in the Territo case says that there's a right to counsel to challenge [69] your detention. The holding of Territo which is I don't think helpful to the petitioners, is that it doesn't matter if you're an American citizen you still may be held as an enemy combatant or as a prisoner of war. Now it's true that as a factual matter, Mr. Territo did have access to counsel. But I think in order to understand why that's true, nobody said he had a right to it, it's just that he in fact had access to counsel. And I think in order to understand that you have to understand the very different circumstances that were at issue there. Mr. Dunham said, "Well, Mr. Territo got access to counsel and yet we still won World War II". But Mr. Territo was given access to counsel after the form, after the cessation of hostilities with Italy, at that point Italy was already one of our allies.

And just in a more practical matter, the way that prisoners of war were being treated at that time during World War II, they were given substantial rights, they could go to the cinema on Saturday night. And under circumstances like that it wouldn't make any sense to deny somebody a right to counsel if they already were allowed those kind of interactions with other individuals.

And I think that the fact that Mr. Hamdi is being detained under the circumstances that he is being detained, suggests that the government has very different interests in the present conflict.

THE COURT

MR. CLEMENT Well, I'd like to be [70] very specific about that because it is not true that all the information that Judge Doumar addressed in his production order was given to counsel in the Lindh case, at least that's my understanding. The intelligence information, the intelligence interviews that Judge Doumar has ordered produced were not at issue there. There was some law enforcement interview notes that were given to counsel in that case. But I think that it's important to understand that some of the information Judge Doumar seeks is not covered by that.

THE COURT

MR. CLEMENT Sure.

THE COURT

MR. CLEMENT It is produced pursuant to an effort by defense counsel to obtain Brady material. And I think that's part of the reason why that precedent doesn't really apply here, because as the Supreme Court emphasized just last term in the Rouis decision the Brady right is just a trial right so it wouldn't apply outside of the context of somebody being, somebody facing criminal charges.

THE COURT

MR. CLEMENT Right, it was reviewed under the procedures that are specifically supplied for criminal

cases that seek the statute and of course, those materials although they were not classified are in fact sensitive which is why as Chief Judge Wilkinson noted they're still [71] subject to a protective order in that case.

THE COURT

MR. CLEMENT Well, I think that we'd be very reluctant to do that, and part of the reason for that is something that Chief Judge Wilkinson indicated, which is the concern about the precedent that would be set by doing so. Because it may be that the law enforcement interview notes or at least some of them, don't involve absolutely classified information but as I say, they do involve sensitive information. There may be other cases where those reports involve classified information, certainly information that would be of tremendous value to our adversaries, to counter-intelligence agents within our adversaries, if they ever became public.

THE COURT

MR. CLEMENT I don't think we would and I think that the government has tried to balance an interest in making clear that, we certainly want to give people the reassurance that Mr. Hamdi is a prototypical enemy combatant and he is somebody who, under any definition of the enemy combatant would be detainable as an enemy combatant. And so we wanted to provide a fair amount of information in the declaration. We balanced that against the concern about setting a precedent by providing more information that might well be available in other cases where somebody is seized in the battlefield and it's just not possible to recreate that much [72] information. Or whether an individual, you could have a situation where somebody was seized on the battlefield and the military

has every reason to believe that that individual was an enemy combatant but the person's story in the interrogations always is that they weren't there under those circumstances. And there are a variety of reasons why the government might be, it was reluctant to set that precedent by providing more information than would be necessary in a prototypical case.

THE COURT

MR. CLEMENT That's correct. And I think that the petitioners have made that clear throughout the litigation. And I think that is common ground between the parties. Thank you.

JUDGE WILKINSON Before we adjourn.

316 F.3d 450

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi,

Petitioners-Appellees,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,

Respondents-Appellants.

[CENTER FOR CONSTITUTIONAL RIGHTS; 140 LAW PROFESSORS AND 19 INTERESTED ORGANIZATIONS; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA,]

Amici Curiae in support of Appellees

[RUTH WEDGEWOOD; SAMUEL ESTREICHER; DOUGLAS W. KMIEC; DAVID B. RIVKIN, JR.; LEE A. CASEY; DARIN R. BARTRAM,]

Amici Curiae in Support of Appellants

No. 02-7338

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, Senior District Judge.
(CA-02-439-2)

Argued: October 28, 2002

Decided: January 8, 2003

Before WILKINSON, Chief Judge and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded with directions to dismiss by published opinion. Opinion by WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges, in which all three concur.

COUNSEL

ARGUED: Paul Clement, Deputy Solicitor General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Frank Willard Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Gregory G. Garre, Assistant to the Solicitor General, David B. Salmons, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Larry W. Shelton, Assistant Federal Public Defender, Geremy C. Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. David B. Rivkin, Jr., Lee A. Casey, Darin R. Bartram, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Amici Curiae Ruth Wedgwood, et al. Shayana Kadidal, Barbara Olshansky, Michael Ratner, William Goodman, CENTER FOR CONSTITUTIONAL RIGHTS,

New York, New York, for Amici Curiae Center for Constitutional Rights, et al. Steven D. Benjamin, Richmond, Virginia; Donald G. Rehkopf, Jr., BRENNA & BRENNA, Rochester, New York, for Amicus Curiae Association of Criminal Defense Lawyers. Steven R. Shapiro, Lucas Guttentag, Arthur N. Eisenberg, Robin Goldfaden, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Rebecca K. Glenberg, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, Richmond, Virginia, for Amici Curiae ACLU, et al.

OPINION

WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges:

Yaser Esam Hamdi filed a petition under 28 U.S.C. § 2241 challenging the lawfulness of his confinement in the Norfolk Naval Brig.[1] On this third and latest appeal, the United States challenges the district court's order requiring the production of various materials regarding Hamdi's status as an alleged enemy combatant. The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active

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[1] The court expresses its appreciation to the Public Defender's Office for the Eastern District of Virginia, the United States Attorney's Office for the Eastern District of Virginia, and the Solicitor General's Office for the professionalism of their efforts throughout these expedited appeals.

combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

I.

As recounted in earlier appeals regarding Hamdi's detention, *Hamdi v. Rumsfeld,* 294 F.3d 598 (4th Cir. 2002) ("*Hamdi I*"), and *Hamdi v. Rumsfeld,* 296 F.3d 278 (4th Cir. 2002) ("*Hamdi II*"), the al Qaida terrorist network, utilizing commercial airliners, launched massive attacks on the United States on September 11, 2001, successfully striking the World Trade Center in New York City, and the Pentagon, the military headquarters of our country, near Washington, D.C. A third unsuccessful attack upon at least one additional target, most likely within Washington, D.C., was foiled by the efforts of the passengers and crew on the hijacked airliner when it crashed in Somerset County, Pennsylvania, southeast of Pittsburgh. In total, over 3,000 people were killed on American soil that day.

In the wake of this atrocity, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The President responded by ordering United States armed forces to

Afghanistan to subdue al Qaida and the governing Taliban regime supporting it. During this ongoing military operation, thousands of alleged enemy combatants, including Hamdi, have been captured by American and allied forces.

The present case arises out of Hamdi's detention by the United States military in Norfolk, Virginia. Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship. He has remained in Norfolk since April 2002.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for writ of habeas corpus, naming as petitioners both Hamdi and himself as next friend.[2] The petition alleged that Hamdi is a citizen of the United States who was residing in Afghanistan when he was seized by the United States government. According to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the

[2] This court has previously determined that Esam Fouad Hamdi is a proper next friend. *Hamdi I,* 294 F.3d at 600 n.1. Two earlier petitions filed by the Federal Public Defender for the Eastern District of Virginia Frank Dunham and Christian Peregrim, a private citizen from New Jersey, were dismissed. Neither Dunham nor Peregrim had a significant relationship with the detainee, and Hamdi's father plainly did. *Id.* at 606.

Northern Alliance." The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" in Afghanistan, transported from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba, in January 2002, and ultimately transferred to the Norfolk Naval Station Brig in Norfolk, Virginia, in April 2002.

Although acknowledging that Hamdi was seized in Afghanistan during a time of active military hostilities, the petition alleges that "as an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judicial tribunal, or the right to counsel, "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." By way of relief, the petition asks, inter alia, that the district court: (1) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending"; (2) "Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution"; (3) "To the extent Respondents contest any material factual allegations in th[e] Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody."

On June 11, before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham as counsel for the detainee and ordered the government to allow the Defender unmonitored access to Hamdi. On July 12, we reversed the district court's order granting counsel immediate access to Hamdi.

Hamdi II, 296 F.3d at 279. We cautioned that Hamdi's petition involved complex and serious national security issues and found that the district court had not shown proper deference to the government's legitimate security and intelligence interests. We did not order the petition dismissed outright, however, noting our reluctance to "embrac[e] [the] sweeping proposition . . . that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.* at 283. Rather, we sanctioned a limited and deferential inquiry into Hamdi's status, noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* (citing *Ex parte Quirin,* 317 U.S. 1, 31, 37 (1942)). We also instructed that, in conducting the inquiry, "the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 284.

Following this remand, the district court held a hearing on July 18. During this hearing, the court expressed its concern over possible violations of Hamdi's rights as an American citizen. The court also questioned the government's most basic contentions regarding the ongoing hostilities, asking "with whom is the war I should suggest that we're fighting?" and "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?" The court directed that "[a]ll of these [answers should] be provided in the answer that the government is to file to

the petition" and directed the United States to file such a response to Hamdi's petition by July 25.

On July 25, the government filed a response to, and motion to dismiss, the petition for a writ of habeas corpus. Attached to its response was an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi's petition – specifically, that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant.

In addition to stating that Hamdi has been classified as an enemy combatant, the Mobbs declaration went on further to describe what the government contends were the circumstances surrounding Hamdi's seizure, his transfer to United States custody, and his placement in the Norfolk Naval Brig. According to Mobbs, the military determined that Hamdi "traveled to Afghanistan in approximately July or August of 2001" and proceeded to "affiliate[] with a Taliban military unit and receive[] weapons training." While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK-47 rifle at the time of surrender. Hamdi was then transported with his unit from Konduz, Afghanistan to the Northern Alliance prison in Mazar-e-Sharif, Afghanistan and, after a prison uprising there, to a prison at

Sheberghan, Afghanistan. Hamdi was next transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.

In keeping with our earlier instruction that the district court should proceed cautiously in reviewing military decisions reached during sanctioned military operations, we directed the district court to first "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Following this order, the district court held a hearing on August 13 to review the sufficiency of the Mobbs declaration.

During this hearing, the district court recognized that "the government is entitled to considerable deference in detention decisions during hostilities." The court also noted that it did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." Despite these observations, however, the court asserted that it was "challenging everything in the Mobbs' declaration" and that it intended to "pick it apart" "piece by piece." The court repeatedly referred to information it felt was missing from the declaration, asking "Is there anything in here that said Hamdi ever fired a weapon?" The court questioned whether Mr. Mobbs was even a government employee and intimated that the government was possibly hiding disadvantageous information from the court.

The district court filed an opinion on August 16, finding that the Mobbs declaration "falls far short" of supporting Hamdi's detention. The court ordered the

government to turn over, among other things, copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who have questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all of the dates and locations of his subsequent detention.

Upon the Government's motion to certify the August 16 production order for immediate appeal, the district court certified the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?" We then granted the Government's petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b). In so doing, we noted that "this court 'may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.'" *Hamdi v. Rumsfeld*, No. 02-7338 (4th Cir. Sept. 12, 2002) (order granting petition for interlocutory review) (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

II.

Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status – that of American citizen and that of alleged enemy combatant – raises important questions about the role of the courts in times of war.

A.

The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin,* 317 U.S. 1, 25 (1942). Article I, section 8 grants Congress the power to "provide for the common Defence and general Welfare of the United States . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin,* 317 U.S. at 26. These powers include the authority to detain those captured in armed struggle. *Hamdi II,* 296 F.3d at 281-82.[3] These powers likewise

[3] Persons captured during wartime are often referred to as "enemy combatants." While the designation of Hamdi as an "enemy combatant" has aroused controversy, the term is one that has been used by the Supreme Court many times. *See, e.g., Madsen v. Kinsella,* 343 U.S. 341, 355 (1952); *In re Yamashita,* 327 U.S. 1, 7 (1946); *Quirin,* 317 U.S. at 31.

extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, *see Ludecke v. Watkins,* 335 U.S. 160, 173 (1948), and to confiscate or destroy enemy property, *see Juragua Iron Co. v. United States,* 212 U.S. 297, 306 (1909).

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi II,* 296 F.3d at 281.

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v.*

Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

B.

Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth

Amendment is. It applies to American citizens regardless of race, color, or creed. And as we become a more diverse nation, the Bill of Rights may become even more a lens through which we recognize ourselves. To deprive any American citizen of its protections is not a step that any court would casually take.

Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government. Indeed, if due process means anything, it means that the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (internal quotation marks omitted). The Constitution is suffused with concern about how the state will wield its awesome power of forcible restraint. And this preoccupation was not accidental. Our forbears recognized that the power to detain could easily become destructive "if exerted without check or control" by an unrestrained executive free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968)).

The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable

law." *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 120 (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. *See Hamdi II,* 296 F.3d at 283.

It is significant, moreover, that the form of relief sought by Hamdi is a writ of habeas corpus. In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. As early as 1789, Congress reaffirmed the courts' common law authority to review detentions of federal prisoners, giving its explicit blessing to the judiciary's power to "grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment" for federal detainees. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

C.

As the foregoing discussion reveals, the tensions within this case are significant. Such circumstances should counsel caution on the part of any court. Given the concerns discussed in the preceding sections, any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American

soil or the role that counsel might play in such a proceeding. *See, e.g., Padilla v. Bush,* No. 02 Civ. 445 (MBM), 2002 WL 31718308 (S.D.N.Y. Dec. 4, 2002). We shall, in fact, go no further in this case than the specific context before us – that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." *Duncan v. Kahanamoku,* 327 U.S. 304, 313-14 (1946) (footnotes omitted). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks. *Hamdi II,* 296 F.3d at 283.

In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front . . . ." *In re Territo,* 156 F.2d 142, 145

(9th Cir. 1946). In this respect, "captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). And the precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of war.

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. *Hamdi II,* 296 F.3d at 283-84. As the Supreme Court has recognized, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager,* 339 U.S. 763, 779 (1950).[4]

[4] The government has contended that appointment of counsel for enemy combatants in the absence of charges would interfere with a third detention interest, that of gathering intelligence, by establishing an adversary relationship with the captor from the outset. *See Hamdi II,* 296 F.3d at 282 (expressing concern that the June 11 order of the district court "does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence"). That issue, however, is not presented in this appeal.

The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability. To the contrary, the Supreme Court has said that "[i]n adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States,* 488 U.S. 361, 381 (1989). If anything, separation of powers bears renewed relevance to a struggle whose unforeseeable dangers may demand significant actions to protect untold thousands of American lives.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of war-making authority conferred by the Constitution and invoked by Congress and the executive branch.

III.

After the district court issued its August 16 production order, it granted respondent's motion for an interlocutory appeal of that order. The following question was certified for our review:

> Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

As the Supreme Court has made clear, we are not limited to this single question. Rather, an appellate court may address any issue fairly included within the certified order, because "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205 (1996) (internal quotation marks omitted).

On this appeal, it is argued that Hamdi's detention is invalid even if the government's assertions were entirely accurate. If that were clearly the case, there would be no need for further discovery such as that detailed in the August 16 production order, because Hamdi's detention would be invalid for reasons beyond the scope of any factual dispute. Indeed, any inquiry into the August 16 production order or any discussion of the certified question would be unnecessary, because neither could suffice to justify a detention that, as a threshold matter, was otherwise unlawful. Moreover, the burden of the August 16 order would necessarily outweigh any benefits if, quite independent of the disputed factual issues, Hamdi were already entitled to relief. *See* Fed. R. Civ. Proc. 26(b)(1)-(2). For that reason, any purely legal challenges to Hamdi's detention are fairly includable within the scope of the certified order. *See Juzwin v. Asbestos Corp.,* 900 F.2d 686, 692 (3d Cir. 1990) (stating that, on § 1292(b) review of an order denying a dispositive motion, an appellate court is "free to consider all grounds advanced in support of the grant of [the motion] and all grounds suggested for sustaining its denial" (internal quotation marks omitted)).

In this vein, Hamdi and amici have in fact pressed two purely legal grounds for relief: 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. We now address them both.[5]

A.

18 U.S.C. § 4001 regulates the detentions of United States citizens. It states in full:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

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[5] We reject at the outset one other claim that Hamdi has advanced in abbreviated form. He asserts that our approval of his continued detention means that the writ of habeas corpus has been unconstitutionally suspended. *See* U.S. Const. art. I, § 9. We find this unconvincing; the fact that we have not ordered the relief Hamdi requests is hardly equivalent to a suspension of the writ.

18 U.S.C. § 4001 (2002). Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war." 10 U.S.C. § 956(5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons "similar to prisoners of war" without also authorizing their detention in the first instance.

Any alternative construction of these enactments would be fraught with difficulty. As noted above, the detention of enemy combatants serves critical functions. Moreover, it has been clear since at least 1942 that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317

U.S. at 37. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

It is likewise significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. That statute had provided for the preventive "apprehension and detention" of individuals inside the United States "deemed likely to engage in espionage or sabotage" during "internal security emergencies." H.R. Rep. 92-116, at 2 (Apr. 6, 1971). Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia, "permit[] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II." *Id.* There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is. We therefore reject Hamdi's contention that § 4001(a) bars his detention.

B.

Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action."

Goldstar (Panama) v. United States, 967 F.2d 965, 968 (4th Cir. 1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." *Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287); *see also Holmes v. Laird,* 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi provides no reason to conclude that 28 U.S.C. § 2241 makes these diplomatically-focused rights enforceable by a private right of petition. Indeed, it would make little practical sense for § 2241 to have done so, since we would have thereby imposed on the United States a

mechanism of enforceability that might not find an analogue in any other nation. This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132. There is a powerful and self-regulating national interest in observing the strictures of the Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance. As the Court in *Eisentrager* observed about the predecessor to the current Geneva Convention, "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n.14.

Even if Article 5 were somehow self-executing, there are questions about how it would apply to Hamdi's case. In particular, it is anything but clear that the "competent tribunal" which would determine Hamdi's status would be an Article III court. Every country has different tribunals, and there is no indication that the Geneva Convention was intended to impose a single adjudicatory paradigm upon its signatories. Moreover, Hamdi's argument begs the question of what kind of status determination is necessary under Article 5 and how extensive it should be. Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal

before they may be punished for the acts which render their belligerency unlawful. *Quirin,* 317 U.S. at 31. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him. The Geneva Convention certainly does not require such treatment.

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order was proper on its own terms.

IV.

As we will discuss below, we conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.

We also note that the order, if enforced, would present formidable practical difficulties. The district court indicated that its production request might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status. The court plainly did not preclude making further production demands upon the government, even suggesting that it might "bring Hamdi before [the court] to inquire about [his] statements."

Although the district court did not have "any doubts [that Hamdi] had a firearm" or that "he went to Afghanistan to be with the Taliban," the court ordered the government to submit to the court for in camera, ex parte review: (1) "[c]opies of all Hamdi's statements, and the

notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country"; (2) "[a] list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews"; (3) "[c]opies of any statements by members of the Northern Alliance" regarding Hamdi's surrender; (4) "[a] list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention"; (5) "[t]he name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant"; (6) "[t]he name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station"; and (7) "the screening criteria utilized to determine the status of Hamdi." The court's order allows the government to redact "intelligence matters" from its responses, but only to the extent that those intelligence matters are outside the scope of inquiry into Hamdi's legal status.

Hamdi argues vigorously that this order should be affirmed. Because of the alleged "breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants," Br. of the Petitioners/Appellees at 27, Hamdi argues we must allow the district court to subject the government's classification of him to a searching review. While the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, *see* 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case – whether further factual exploration would

bring an Article III court into conflict with the warmaking powers of Article I and II. Here, the specific interests asserted by the government flow directly from the warmaking powers and are intimately connected to them. Whatever the general force of these interests (which we discussed extensively above), they are most directly implicated by captures in a zone of active combat operations.

A review of the court's August 16 order reveals the risk of "stand[ing] the warmaking powers of Articles I and II on their heads," *Hamdi II,* 296 F.3d at 284. The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

The district court further ordered the government to produce a list of all interrogators who have questioned Hamdi, including their names and addresses and the dates of the interviews, copies of any statements by members of the Northern Alliance regarding Hamdi's surrender, and a list that includes the date of Hamdi's capture and all the dates and locations of his subsequent detention. Once again, however, litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the matter even further is the fact that Hamdi was originally captured by Northern

Alliance forces, with whom American forces were generally allied. The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime. The court also expressed concern in its order that the Northern Alliance did not "identify the unit [to which Hamdi was affiliated]," "where or by whom [Hamdi] received weapons training or the nature and extent thereof," or "who commanded the unit or the type of garb or uniform Hamdi may have worn. . . ." In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V.

The question remains, however, whether Hamdi's petition must be remanded for further proceedings or dismissed.

Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he is an "enemy combatant" subject to detention during the ongoing hostilities. Thus, as with all habeas actions, we begin by examining the precise allegations presented to us by the respective parties. In this case, there are two allegations that are crucial to our analysis. First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan, a country in which hostilities were authorized and ongoing at the time of the seizure, but that his continued detention in this country without the full panoply of constitutional protections is unlawful. Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detention, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Generally speaking, in order to fulfill our responsibilities under Article III to review a petitioner's allegation that he is being detained by American authorities in violation of the rights afforded him under the United States Constitution, we must first determine the source of the authority for the executive to detain the individual. Once the source of the authority is identified, we then look at the justification given to determine whether it constitutes a legitimate exercise of that authority.

A.

Here the government has identified the source of the authority to detain Hamdi as originating in Article II, Section 2 of the Constitution, wherein the President is given the war power. We have already emphasized that the standard of review of enemy combatant detentions must be a deferential one when the detainee was captured abroad in a zone of combat operations. The President "is best prepared to exercise the military judgment attending the capture of alleged combatants." *Hamdi II,* 296 F.3d at 283. Thus, in *Quirin,* the Supreme Court stated in no uncertain terms that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin,* 317 U.S. at 25.

This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has

voluntarily submitted – and urged us to review – an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

The Mobbs affidavit consists of two pages and nine paragraphs in which Mobbs states that he was "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them." In the affidavit, Mobbs avers that Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK-47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit

Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance military unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined previously. We think this inquiry went far beyond the acceptable scope of review.

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency, as the district court attempted to do. The court's approach, however, had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its power to detain under the war powers of Article II. *See Eisentrager,* 339 U.S. at 793 (Black, J., dissenting) ("[I]t is no 'crime' to be a soldier."); *cf. In re Winship,* 397 U.S. 358, 363 (1970) (explaining that elevated burden of proof applies in criminal cases because of consequences of conviction, including social stigma). To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.

The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through

the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there. The district court, after reviewing the Mobbs affidavit, did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." To delve further into Hamdi's status and capture would require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law.

For these reasons, and because Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. *See Quirin,* 317 U.S. at 25. Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.

B.

We turn then to the question of whether, because he is an American citizen currently detained on American soil by the military, Hamdi can be heard in an Article III court to rebut the factual assertions that were submitted to support the "enemy combatant" designation. We hold that

no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.

In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the adjudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has indeed been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable. *See, e.g., INS v. St. Cyr,* 533 U.S. 289, 306 (2001) (describing historical practice under which, so long as "there was some evidence to support" a deportation order, habeas courts would not "review factual determinations made by the Executive"); *Eagles v. Samuels,* 329 U.S. 304, 312 (1946); *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925). In each of these cases, the Court indicated that the role of the writ is not to correct "mere error" in the executive's exercise of a discretionary power, but rather to check the executive branch if it asserts a "power to act beyond the authority granted." *Eagles,* 329 U.S. at 311-12. Thus, the government asserts, the role of a habeas court is not to reconsider the executive's decision, but rather only to confirm that "there was *some* basis for the challenged executive determination." Br. for Respondents-Appellants at 29. Once that determination is made, the government further asserts, the detainee may not offer any rebuttal evidence and no further factual inquiry is allowed.

It is not necessary for us to decide whether the "some evidence" standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate.

1.

As we have emphasized throughout these appeals, we cannot set aside executive decisions to detain enemy combatants "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin,* 317 U.S. at 25. We cannot stress too often the constitutional implications presented on the face of Hamdi's petition. The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual and, were we called upon to delve into

it, would likely entail substantial efforts to acquire evidence from distant battle zones. *See Eisentrager,* 339 U.S. at 779. The second question may require fine judgments about whether a particular activity is linked to the war efforts of a hostile power – judgments the executive branch is most competent to make.

Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and Congressional authorization for use of military force in the wake of al Qaida's attack. *Quirin,* 317 U.S. at 25. Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch.

2.

Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.

Indeed, this same issue arose in *Quirin*. In that case, petitioners were German agents who, after the declaration of war between the United States and the German Reich, were trained at a German sabotage school where they "were instructed in the use of explosives and in methods of secret writing." *Quirin*, 317 U.S. at 21. The petitioners then journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices. All of them were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States. All of the petitioners were born in Germany but had lived in the United States at some point. One petitioner claimed American citizenship by virtue of the naturalization of his parents during his youth. The Court, however, did not need to determine his citizenship because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." *Id.* at 37. The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not

entitle him to a searching review of the factual determinations underlying his seizure there.

3.

Similarly, we reject Hamdi's argument that even if his initial detention in Afghanistan was lawful, his continuing detention on American soil is not. Specifically, Hamdi contends that his petition does not implicate military concerns because "the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas on the basis of caution rather than accuracy." Br. of the Petitioners/Appellees at 44. But the fact that Hamdi is presently being detained in the United States – as opposed to somewhere overseas – does not affect the legal implications of his status as an enemy combatant. For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another. It is not clear why the United States should be precluded from exercising its discretion to move a detainee to a site within this country, nor do we see what purpose would be served by second guessing the military's decision with respect to the locus of detention.

4.

To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner

has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

C.

Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." *Id.* at 53-54. Whether the timing of a cessation of hostilities is justiciable is far from clear. *See Ludecke,* 335 U.S. at 169 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."). The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. *See United States v. The Three Friends,* 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). In any case, we need not reach this issue here. The government notes that American troops

are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.

VI.

It is important to emphasize that we are not placing our imprimatur upon a new day of executive detentions. We earlier rejected the summary embrace of "a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II,* 296 F.3d at 283. But, Hamdi is not "any American citizen alleged to be an enemy combatant" by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.

Cases such as Hamdi's raise serious questions which the courts will continue to treat as such. The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so.

The events of September 11 have left their indelible mark. It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but

from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed. It is so ordered.

JUDGMENT

FILED: January 8, 2003

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 02-7338
CA-02-439-2

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi

Petitioners-Appellees

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander

Respondents-Appellants

[RUTH WEDGEWOOD; SAMUEL ESTREICHER; DOUGLAS W. KMIEC; DAVID B. RIVKIN, JR.; LEE A. CASEY; DARIN R. BARTRAM,]

Amici Curiae in Support of Appellants

[CENTER FOR CONSTITUTIONAL RIGHTS; 140 LAW PROFESSORS AND 19 INTERESTED ORGANIZATIONS; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA,]

Amici Curiae in support of Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court and remands this case for further proceedings consistent with this Court's opinion.

/s/ Patricia S. Connor
CLERK

337 F.3d 335

PUBLISHED

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Amici Curiae in support of Appellees

No. 02-7338

Filed: July 9, 2003

ORDER

Appellees filed a petition for rehearing and suggestion for rehearing en banc.

The panel voted to deny panel rehearing.

A member of the Court requested a poll on the petition for rehearing en banc, and a majority of the judges in active service voted to deny rehearing en banc. Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc. Chief Judge Wilkins, and Judges Widener, Wilkinson, Niemeyer, Williams, Michael, Traxler, and Shedd voted to deny rehearing en banc.

Judge Wilkinson filed an opinion, concurring in the denial of rehearing en banc. Judge Traxler filed an opinion, concurring in the denial of rehearing en banc. Judge Luttig filed an opinion, dissenting from the denial of rehearing en banc. Judge Motz filed an opinion, dissenting from the denial of rehearing en banc.

The Court denies the petition for rehearing and suggestion for rehearing en banc. The mandate shall issue forthwith.

Entered at the direction of Judge Wilkinson for the Court.

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the denial of the rehearing en banc. The panel opinion written by Chief Judge Wilkins, Judge Traxler, and myself has already properly resolved this case. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

I thus offer only these few comments in response to the dissent of my good colleague Judge Motz.

Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about that. The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief. Art. II, Sec. II. And the question is essentially whether the United States can capture and detain prisoners of war without subjecting the factual circumstances surrounding foreign battlefield seizures to extensive in-court review.[1] The answer to this is now – and always has been – yes. In giving prisoners of war the right to litigate their detentions in American courts, the dissent would install a more restrictive regime on the executive branch after September 11 than existed before. I regret that my colleague does not even quote the

[1] The government does not concede that Hamdi is a prisoner of war, but rather asserts that he is an unlawful combatant. For the purposes of this case, the distinction is irrelevant because the decision to detain until the cessation of hostilities belongs to the executive in either case. *See Hamdi*, 316 F.3d at 469.

The panel earlier expressed doubt that the timing of a cessation of hostilities was even justiciable. *Hamdi v. Rumsfeld*, 316 F.3d at 476 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.")). It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat and when the status of combatants, their terms of release, and the mutuality of exchanges may all remain subjects for negotiation and diplomacy. *See Ludecke*, 335 U.S. at 169; *The Three Friends*, 166 U.S. 1, 63 (1897); *The Prize Cases*, 67 U.S. 635, 670 (1862).

provisions of Article I and Article II which delegate the conduct of war to the coordinate branches of our government. For the course on which my dissenting colleague is embarked will trespass, increment by increment, upon those powers, to the detriment of the judiciary's own obligation to respect the proper limits and boundaries of its role.

To claim, as my colleague does here, that there was no meaningful judicial review of Hamdi's detention is incorrect. There was extensive review of every legal challenge to Hamdi's detention. The dissent wishes to proceed further and litigate precisely why petitioner was seized and whether the military capture can be justified. The conduct of war, however, involves innumerable discretionary decisions made by our armed forces in the field every day. Many of them have life or death consequences. To subject these discretionary decisions made in the course of foreign combat operations to the prospect of domestic litigation would be an unprecedented step. Doing so would ignore the fundamentals of Article I and II – namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war. *See The Prize Cases*, 67 U.S. 635, 670 (1862).

Hamdi's own filings make clear that he was seized in a zone of active combat operations. Hamdi's petition notes that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." *See* Petition for Habeas Corpus, p. 2. In their traverse, petitioners state that the petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." *See* Traverse and Response to Respondent's Motion to Dismiss, p. 2. And

outside the legal arena, petitioner Esam Fouad Hamdi, in a letter to Senator Patrick J. Leahy, stated that they were "not challenging the battlefield determination, decision to detain individuals in the theater of combat." *See* Letter to Senator Patrick J. Leahy, August 5, 2002. Even the district court, while ordering a more intrusive examination of the circumstances of Hamdi's capture, noted that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge." *See* Order of August 16, 2002, p. 8.[2] Our review of the petition was undertaken in light of this undisputed fact.

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[2] The above submissions were repeatedly reinforced by Hamdi's counsel in open court. *See, e.g.*, "Hamdi[,] as far as I know, is the only [American citizen] out of all the detainees that were gathered up on the battlefield in Afghanistan." (Tr. of Oct. 28, 2000 oral argument at 37); Hamdi's counsel describing as "correct" the district judge's statement that "this man was in a fighting situation. . . . He was where the fight was." (Tr. of Aug. 13, 2002 district court proceedings at 70-71). Indeed, as Judge Traxler's thoughtful opinion indicates, the record is replete with admissions that Hamdi was captured in Afghanistan during hostilities, references that are fully consistent with the panel opinion and that make the locus of Hamdi's seizure susceptible to little more than metaphysical doubt. The fact that the panel may not have specifically quoted all such references in its opinion in no way implies that it rejected their validity.

The dissent makes the contention that Hamdi's father as next friend is incapable of making representations on Hamdi's behalf. *Post* at 62. But the cases my colleague cites in no way involved the constitutional principles implicated by a foreign battlefield capture. *See White v. Joyce*, 158 U.S. 128 (1895); *Kingsbury v. Buckner*, 134 U.S. 650 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940). In seeking to deny effect to the filings of the next friend in this case, the dissent's approach would abrogate yet once again the separation of powers by endowing those deemed enemy combatants with rights comparable to those enjoyed by ordinary civil or criminal litigants. And in decrying this

(Continued on following page)

With respect, the dissent's demand for further factual inquiries raises many more questions than it answers. The dissent notes vaguely that it wants a non-hearsay basis for petitioner's detention and that the Mobbs Declaration must be probed for every incompleteness or inconsistency. *Post* at 58. While the dissent appears to acknowledge that the district court production order went too far, its specific criticisms of the Mobbs Declaration suggest otherwise. This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.

The dissent declines to acknowledge the perils in its path, and we are left to guess at how it would proceed. Opposing affidavits would not likely satisfy the dissent, for they would leave the court to weigh one protestation against the other with little means of doing so. *Ex parte*, *in camera* review would set disputes in motion over the scope of redaction and create a whole new set of secrecy issues surrounding Hamdi's case. *Ex parte*, *in camera* submissions would likely please no one – neither the government required to hand over potentially sensitive materials, nor Hamdi who would be denied the chance to contest an *ex parte* review of them, nor the public who would be left in the dark about the real basis for resolving Hamdi's case. My dissenting colleague also laments the absence of "first-hand knowledge of Hamdi's conduct or status in Afghanistan." *See post* at 65. The dissent is plainly unwilling to

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reasoning as "dizzyingly circular", *see post* at 62 n.1, the dissent again makes clear that nothing less than a full judicial exploration of the circumstances of petitioner's capture will suffice.

trust the judgment of those actually fighting the war that Hamdi was properly seized. What further steps should the judiciary then be prepared to take? What kind of hearings? What role for counsel? What kind of showings? What sort of witnesses? The district court struggled with these questions to ill effect. *See Hamdi*, 316 F.3d at 470-71; *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

My colleague's desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success – its planning, tactics, and intelligence – are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field. At a minimum, if rules are to be prescribed for litigating something as sensitive as the soundness of battlefield detentions in Article III courts, then the prescription should come from Congress or the Executive

– the branches of government charged by our Constitution with the conduct of foreign war. I cannot conceive of the courts on their own motion – without the considered input of the political branches – devising a set of procedures allowing prisoners of war to hold American commanders accountable in federal court. If any illustration of the difficulties and hazards of such a judicial enterprise were needed, the history of Hamdi's case should more than suffice.

My colleague also interprets a series of World War II-era Supreme Court cases as invitations for the judiciary to involve itself in an exacting review of decisions made on foreign battlefields. *Post* at 60-61. My colleague's overreading of these decisions misses their fundamental import: they are replete with warnings that the judiciary must stay its hand when reviewing an exercise of the Commander-in-Chief powers during wartime. *Ex parte Quirin*, for example, holds without reservation that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." 317 U.S. 1, 25 (1942). Likewise, *Johnson v. Eisentrager* emphasized that "[e]xecutive power over enemy aliens" – the enemy combatants at issue in that case – "undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security." 339 U.S. 763, 774 (1950); *see also id.* at 778-79 (detailing the crippling complications that would arise from allowing searching judicial review of the petitioners' detention). And *In re Yamashita* noted that the military tribunals challenged in that case were "not subject to

judicial review merely because they have made a wrong decision on disputed facts." 327 U.S. 1, 8 (1946). "Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined." *Ludecke v. Watkins*, 335 U.S. 160, 172 (1948). These cases are caution signals to the judiciary, not green lights.

I seriously doubt that any mistake was made in Hamdi's case. But the Supreme Court in *Ex parte Quirin*, *Johnson v. Eisentrager*, and *In re Yamashita* was fully aware that war was a messy business, that mistakes could be made, but that close judicial review was nonetheless costly and constitutionally proscribed. And the panel in this case did not seek to move further than the precise case before it. *See Hamdi*, 316 F.3d at 465. To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges. Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present. There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

Finally, although both the panel opinion and the dissent have noted the evidentiary shortcomings of the Mobbs Declaration, there is a value to having the United

States state under oath its reasons for the detention of an American citizen, even one captured during the course of armed combat.[3] To go further, however, would be folly. It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith. It diminishes these interests to inquire whether the judiciary deems them "legitimate," "substantial," or "compelling," for they are grounded in the wording of Articles I and II themselves. The federal judiciary plays a vital role in securing our rights. But the other branches of government also play their part in securing the blessings of our liberty. In this case, the paramount right is that of the citizens of our country to have their democracy's most vital, life-or-death decisions made by those whom the Constitution charges with that task.

In sum, this petition was properly dismissed.

[3] My colleague Judge Luttig's dissent attempts to straddle the issue by taking sides with both parties. On the one hand, it asserts that "the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant." *Post* at 42. On the other hand, it argues that it is likely that "the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard." *Post* at 57. In all events, the panel had before it the straightforward situation where petitioners' filings repeatedly corroborated the government's assertions that the locus of Hamdi's capture was a zone of active combat operations abroad. Unsurprisingly, the panel addressed the case on the basis of what was before it.

TRAXLER, Circuit Judge, concurring in the denial of rehearing en banc:

In their dissents from the denial of rehearing, my colleagues have appreciated the nature and magnitude of the competing interests at stake here. However, because I believe that their opinions at times have unfairly and inaccurately characterized the panel opinion, I regrettably find myself drawn to offer a few comments in response.[1]

I.

Each of my dissenting colleagues argues that the panel erred in premising its decision on the "admission" that Yaser Esam Hamdi was captured within the boundaries of Afghanistan. Judge Luttig questions whether any such admission was made, at least in the petition, and Judge Luttig and Judge Motz both believe that any such admission should be ineffective because it was made by Hamdi's father, Esam Fouad Hamdi, acting as Yaser Esam Hamdi's "next friend," and not directly by Yaser Esam Hamdi.

A.

I begin with Judge Luttig's charge that the panel opinion "is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as 'undisputed'" because they were not, in

[1] Because Judge Wilkinson has already written eloquently, and primarily, in response to Judge Motz's dissent, I focus my comments chiefly on matters raised by Judge Luttig.

his view, "conceded in fact." As an initial premise, I would point out that the panel decision does not characterize *all* the circumstances of Hamdi's seizure as being undisputed. Rather, it characterizes *one* circumstance of Hamdi's seizure as undisputed – his presence in Afghanistan while active military operations were being waged by the United States military against the governing Taliban regime. Hamdi's reason for being in Afghanistan at the time he was seized and the question as to whether he was indeed actively engaged as an enemy to our forces and this country are very much in dispute. The government asserts that Hamdi was in Afghanistan bearing arms as a Taliban soldier when he was seized; Hamdi's father asserts that Hamdi was only temporarily residing in Afghanistan while engaged in relief work when he was apprehended. Thus, the panel opinion's observation is in reality limited to the simple fact that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Hamdi*, 316 F.3d at 459.[2]

As to this more narrow point of disagreement, Judge Luttig correctly observes that the habeas petition does not *explicitly* state that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Id.* However,

[2] *See also Hamdi*, 316 F.3d at 460 (noting that the petitioner "acknowledg[ed] that Hamdi *was seized in Afghanistan* during a time of active military hostilities") (emphasis added); *id.* at 461 (noting that it was "undisputed that Hamdi *was captured in Afghanistan* during a time of armed hostilities there") (emphasis added); *id.* at 474 (noting that "Hamdi's petition *places him* squarely within the zone of active combat") (emphasis added); *id.* at 476 (noting that "it is undisputed that [Hamdi] was captured in a zone of active combat operations").

from this single pleading omission, Judge Luttig inexplicably leaps to the conclusion that the remaining petition allegations are ambiguous on the question (or, worse, that we should ignore them) and, even more inexplicably, to the belief that when responding to a dissent to a denial for rehearing en banc, the panel has somehow forfeited a right to point to any other pleading or representation filed or otherwise made *by the petitioner* that supports the observation, unremarkable when made, that Hamdi was indeed in Afghanistan when captured.

First, the petition's failure to affirmatively state that Hamdi was captured in a foreign combat zone did not and still does not compel me to ignore the other allegations that are present, nor does it cause me to consider that the place of Hamdi's capture is a matter of dispute. As Judge Wilkinson has pointed out, the petition alleges that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." J.A. 9.[3] Were this the only allegation made, I suppose I could speculate about whether Hamdi had traveled from his "reside[nce] in Afghanistan" to another country "when [and where he was] seized by the United States Government," but I need not do so. *Id.* Significantly, the one statement quoted above is not the only allegation made; the petition provides a great deal more information than that. It avers that, following the terrorist attacks on September 11, 2001, "the United States initiated military action against the Taliban

[3] According to later representations made by his father, Hamdi left "Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," and became "trapped in Afghanistan once the military campaign began." J.A. 153.

Government in Afghanistan," and that, "in the course of the military campaign, . . . , the United States provided military assistance to the Northern Alliance." J.A. 10. As a result of this military assistance in Afghanistan, the petition states that

> the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. It goes on to allege that "[o]n or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba," and that on or about that same date, "the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay." J.A. 11.

When we authored the panel opinion, I did not consider these petition allegations to be ambiguous, nor do I today. A plain reading of the submission to us made clear that Esam Fouad Hamdi, as next friend to Yaser Esam Hamdi and as his father, based his claims in large part on the fact that Yaser was seized in Afghanistan in the course of the United States military operations within that country. His contention was that the United States military should release Yaser because he was not in Afghanistan to fight us or our allies and, therefore, was not *properly* being held as an "enemy combatant" by our military forces.

There was not then and there is not now any reason to be troubled by the lack of an *explicit* allegation in the petition that Hamdi was seized in a zone of active combat

in a foreign theater of conflict, because any possible question about whether the petition was incomplete or uncertain in its intent to allege that Hamdi was actually one of the prisoners captured and detained in Afghanistan would have been eliminated by Hamdi's Traverse and Response to the government's motion to dismiss, in which the petitioner engages in his own characterization of the substance of the factual allegations and the claims contained within the petition.

There, the petitioner unequivocally represents that the "claim [does not] implicate Respondents' initial detention of Petitioner Hamdi *in Afghanistan*," but "challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia" and that, because petitioner did not contest the initial detention of Hamdi in Afghanistan, "Hamdi's claims have no practical consequences for the conduct of the military overseas." J.A. 64-65.[4] I do not see how the petitioner could be any clearer. He acknowledged that "[a]ccording to *both* the Petition *and* the Mobbs Declaration, Petitioner Hamdi was

[4] We have also been challenged for our alleged "altered and paraphrased rendition" of the petition's allegation concerning the location of Hamdi's seizure. We did interpret the petition as alleging that "'Hamdi was captured or transferred into the custody of the United States in the Fall of 2001' *in Afghanistan.*" *Hamdi*, 316 F.3d at 460 (emphasis added); *see* J.A. 10. But, even if we assume that the petition was ambiguous on this point, we did not "suppl[y] a geographical location of [Hamdi's] seizure and detention" nor "imput[e] a representation as to this location to the next friend," as charged by Judge Luttig; the next friend supplied the geographical location. Any ambiguity as to whether Hamdi was captured or transferred to the United States military in Afghanistan was likewise cleared up by the next friend's own characterization of his claim.

captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001," J.A. 67 (emphasis added), represented that "[i]n January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba," J.A. 69, and complained that Hamdi was being punished by his "isolat[ion] from others similarly situated in Afghanistan and Guantanamo Bay, Cuba." J.A. 71.[5]

Additionally, as Judge Motz has observed in her dissent, we had been presented in the Joint Appendix with a letter written by Hamdi's father to United States Senator Patrick Leahy (which *petitioner* had submitted to the district court). In the letter, Hamdi's father stated that Yaser had "left our home in Saudi Arabia for Pakistan and

[5] Consistent arguments were also made to this court. For example, Hamdi argued that no deference was due the Respondents because, *inter alia*, "Hamdi's claims do not challenge the conduct of foreign policy, military decision-making, or even the propriety of his initial detention in Afghanistan," but instead challenge "the legality of his indefinite detention in a Norfolk naval brig without due process." Appellees' Brief at 27. Later, it was again represented that "Hamdi's claims do not require review of Respondents' prosecution of the war effort. As noted earlier, Hamdi's claims do not seek judicial review of the Executive Branch's conduct overseas." Appellees' Brief at 40. At yet another point, Hamdi argued that the "Respondents [had] mischaracteriz[ed] Hamdi's claims as an effort to 'second-guess[ ] the military determination' of his enemy combatant status," representing that "[o]n the contrary, the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas. . . ." Appellees' Brief at 44. And, during oral argument, Hamdi again clarified that he was *not* challenging the legality of his initial seizure and detention *in Afghanistan* as an enemy combatant, but rather was only asserting that as one moves away from a foreign battlefield to the United States where civil courts are open and functioning, the deference due to the military's battlefield decision decreases.

then Afghanistan on July 15, 2001 to do relief work in those countries," "was trapped in Afghanistan once the military campaign began," and "was caught up in a local dragnet of non-Afghans in Mazar-e-Sharif in Afghanistan in November 2001" along with John Walker Lindh. J.A. 153. He was then "kept in [an] Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he [was] an American citizen, then they moved him to the Norfolk jail." J.A. 154. At no time was it ever hypothesized that Hamdi might not have been in Afghanistan when he was seized. Indeed, it was affirmatively represented that Hamdi was "caught at the same time Mr. John Walker Lindh was caught" in Afghanistan, but that he was "not [being] treated the same way," and was not properly determined to be "an enemy combatant." J.A. 154.[6]

In keeping with affirmative representations made to the court, at no time did anyone on either side of this controversy aver or allege that Hamdi was anywhere other than Afghanistan when he was captured or detained by the Northern Alliance or when he was turned over to the United States military. Judge Luttig has not pointed to a single contrary allegation. Nor did Hamdi's most capable counsel "gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat," as Judge Luttig might have us believe. The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was

[6] *See United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002).

captured there by our military, but that he was not there as an enemy combatant. Even in his petition for rehearing and rehearing en banc, Esam Hamdi did not assert that Yaser was somewhere other than in Afghanistan when seized; on the contrary, the petition *affirmatively acknowledges* that Hamdi's presence in Afghanistan is indeed an "undisputed" fact. The petition seeks a remand in order to allow Yaser Hamdi the opportunity to meet with counsel and contradict the government's assertion that he *was in a zone of combat operations* within the country of Afghanistan. Again, the petition seeks to litigate the factual question of *why* Hamdi was in Afghanistan when he was seized and, more precisely, whether he was actively engaged as an enemy to our forces, not *whether* he was in Afghanistan during wartime.

I cannot base a decision in so momentous a case on the theoretical possibility that the general allegations in the petition – that the United States obtained access to Hamdi and other prisoners in the custody of the Northern Alliance in Afghanistan and transferred these prisoners "captured in Afghanistan" to Guantanamo Bay – are wrong and do not apply to Hamdi's situation. Indeed, it would be ludicrous for us to somehow presume that they were not intended to be believed. Nor do I know of any precedent that would prompt us here to ignore the factual representations made by the petitioner and counsel in support of the petition. Because the government moved to dismiss the petition, I have assumed the factual allegations of the petition to be true and, for that matter, have accepted the petitioner's in-court representations regarding how they were intended to be interpreted. I am unfamiliar with any principle that would require us to assume that the factual allegations and in-court representations

made by the petitioner *and* the government are false, and none has been cited to me. Indeed, it would seem inappropriate for us to impute such strange intentions to Hamdi's father and his counsel. *Cf. S. Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 428 n.8 (3d Cir. 1999) (employing a "reasonable reading of the complaint" to supply an allegation not expressly made by the plaintiffs).

Petitioner's position has remained quite constant throughout this appeal – that, because Hamdi is an American citizen by birth, he was entitled to meet with appointed counsel in order to contest the factual basis underlying the military's designation of him as an enemy combatant, as opposed to a peaceful resident, in Afghanistan – *once he was removed from the battlefield.* We found this position untenable, holding (for a great many reasons which I need not reiterate here) that when an American citizen is captured in an enemy country where we are engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case. I am still of the belief that this is the proper and legal course of analysis. And I reject, with little hesitation, this bemusing attempt to rewrite the case history and the substance of the habeas claim placed before us.

B.

I likewise disagree with Judge Luttig's belief, shared by Judge Motz, that Hamdi's capture in Afghanistan is not "susceptible to concession in law because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." I am also cited to no

authority for the proposition that we should ignore or disbelieve the petitioner's allegations that Hamdi was taken into military custody in Afghanistan during the combat operations being waged there at the time (whether made expressly in the petition, by implication from its allegations, or by virtue of the petitioner's representations as to the intended meaning of the allegations) merely because the allegations were not personally written by Yaser Hamdi.

Indeed, a next friend does have the power to admit facts on behalf of the real party in interest, subject to the supervision of the court. *See Hall v. Hague*, 34 F.R.D. 449, 450 (D. Md. 1964). Were it otherwise, a next friend might be compelled to contest every fact which might be relevant, thereby creating unnecessary trouble and expense for the parties and the court. *See id.* at 449-50. Or, the mere filing of a next friend petition challenging civil disabilities might compel the lifting of such disabilities so that the real party in interest might participate fully in the litigation. The latter possibility is particularly ominous in a case such as this, as it would enable an alleged enemy combatant to disrupt, with no showing whatsoever, safeguards that the Executive has determined are necessary to protect vital national security interests.[7] In sum, I do not

[7] The cases cited by Judge Motz do not compel a contrary conclusion. *See White v. Miller*, 158 U.S. 128, 146 (1895); *Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940). The cases do not translate to a holding that the court, as opposed to the next friend, is charged with the duty to rewrite a claim brought by a next friend on behalf of a military detainee so as to assure its survival. Here, there is no reason to believe that rights are being bargained away or that a factual mistake is being made. There is surely no doubt as to the nature of the claim before us.

believe the panel erred in construing the petition to admit that Hamdi was captured in Afghanistan and in giving effect to that admission.

C.

This brings me, regrettably, to Judge Luttig's accusation that Judge Wilkinson and I have "attempt[ed] to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone." In a series of charges, Judge Luttig complains that Judge Wilkinson's concurrence "makes reference not only to the next friend petition upon which the panel solely relied, . . . but also to the new materials cited by the government in its response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded, [including] Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court. . . .", charges that this is but another example of "the trend in our court to attempt 'to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion,'" and presumes that our reliance upon petitioner's representations made about his petition is but an improper attempt to "shore up" our joint panel opinion because the panel now "senses . . . analytical softness of its opinion."

First, I can state without hesitation that I have no "sense" that our decision is analytically soft at all. On the contrary, the dissent's failure to point to a single allegation or statement in the record of this case that creates a dispute as to where Hamdi was when he was seized or

detained by our allies or our own military forces should end the discussion.

Second, Judge Luttig appears to have forgotten his characterization of our panel opinion as a "challenged panel opinion," albeit *challenged* in the form of the dissents written by Judge Luttig and Judge Motz to the full court's vote *not* to rehear the case en banc. Judge Luttig's criticism appears to be premised upon a belief that when panel members write in response to a dissent to a denial of rehearing en banc, it is improper for them to refer to anything in the original record which was not specifically referenced in the panel decision, as this would amount to "supply[ing] . . . important new facts or reasoning" not susceptible to appellate review. Such "additional support," Judge Luttig asserts, became "irrelevan[t] as a matter of law given that they were not relied upon in the panel opinion."

Obviously, any response by a panel, unanimous at the time the decision was rendered, to a dissent from a denial of rehearing en banc might be construed as an act of bolstering or "shor[ing] up" the published opinion in some sense. Otherwise, there would be nothing to say. Yet, I find no reason to remain silent when our opinion is being misinterpreted. I am confident that neither Judge Wilkinson nor I have informally "modif[ied]" the panel decision which we, along with Judge Wilkins, so painstakingly authored together. It is not my opinion-writing practice to recite every source of information contained within a joint appendix, nor every source directly relied upon in arguments. Indeed, there is rarely, if ever, a need to clutter an opinion with record support for uncontroversial statements that the parties have not contested in their pleadings, responses, briefs, or arguments.

In any event, I see no need to modify the panel opinion because we have pointed to no "important new facts or reasoning." We observed in the panel opinion that the habeas petition before us for disposition placed Hamdi in an enemy country when he was seized and detained by our military forces as an enemy combatant. In response to Judge Luttig's charge that the language of the petition does *not* place Hamdi in Afghanistan at the point of seizure, Judge Wilkinson and I have only gone so far as to point out that any question as to whether we have properly characterized the claims can be laid to rest by petitioner's own characterization of those allegations. Neither of us has pointed to anything that has not at all times been a part of the record and entirely consistent with the petition's allegations outlined above.[8]

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[8] For this reason, I also think it misleading to characterize the Traverse and Leahy letter as "new materials cited by the government in response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded." These materials have been in the district court record and in the Joint Appendix since the inception of the appeal, and have been referred to by the parties throughout this litigation. There is nothing "new" about them.

With specific regard to Esam Hamdi's letter to Senator Leahy, we are additionally confronted by Judge Motz's view that it was improperly "ignored" by us and Judge Luttig's belief that it should have been ignored because it is "obviously irrelevant" to the issue. We considered everything submitted by the parties in the Joint Appendix and all of the arguments when authoring our joint opinion. We did not ignore the Leahy letter or find it to be "obviously irrelevant." The letter was presented to the district court by Hamdi's counsel, along with several other documents. The panel did not expressly cite to the letter to support the observation that Yaser Esam Hamdi was captured in a combat zone. But, like the Traverse (and other representations made below and at oral argument before this court), the Leahy letter was perfectly consistent with the unremarkable observation which we drew

(Continued on following page)

II.

I turn next to Judge Luttig and Judge Motz's shared belief that we have placed undue significance on the fact that Hamdi was seized in a foreign combat zone in evaluating the legal sufficiency of the Mobbs Declaration and, by doing so, have somehow paved the way for widespread deprivation of the individual constitutional rights of our citizens.

First, we have not pulled the significance of this simple fact from thin air. It is grounded in the time-honored rule of law in wartime – that all persons residing in an enemy country during hostilities are deemed to be enemies, regardless of nationality. *See Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06 (1909). "[U]nder the recognized rules governing the conduct of a war between two nations, . . . all persons, whatever their nationality, who reside [] [in the enemy country] [are], pending such war, to be deemed enemies of the United States and all of its people." *Id.*; *see also Lamar v. Browne*, 92 U.S. 187, 194 (1875); *Young v. United States*, 97 U.S. 39, 60 (1877). This is not to say that all persons residing within the enemy country are *in fact* enemies, or specifically that Hamdi was necessarily an enemy combatant merely because he was in Afghanistan during a conflict between the United States and the Afghan government. But, significant consequences necessarily attached to Hamdi's presence in Afghanistan; his individual rights stood in tension with the Executive's

from the allegations of the petition before us and as they had been represented to us, *i.e.*, that Hamdi was indeed in Afghanistan when he was seized. It certainly did not raise any ambiguity in the petition concerning Hamdi's location when he was seized.

wartime powers under Article II. Consequently, the Judiciary became compelled, by the nature of war and by dint of the separation of powers we are required to safeguard and honor, to give deference to the Executive to determine who within a hostile country is friend and who is foe.[9]

Second, Judge Motz and Judge Luttig's collective fear that our recognition of this time-honored principle might result in innocent journalists or unwitting tourists falling victim to unreviewable military detentions anywhere in the world can be easily laid to rest. Judge Motz, for example, asserts that our decision would allow "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [to] be imprisoned indefinitely" by our military, that "any American citizen seized in a part of the world where American troops are present – *e.g.*, the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely, merely by asserting that the area is a zone of active combat," and the even more extreme "fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, *even one captured on*

[9] In his petition for rehearing and rehearing en banc, petitioner argued it could only be said to be undisputed that Hamdi was in a zone of active combat operations if the entire country of Afghanistan is such a zone at the time of capture. I have no problem with this view. The United States is in a sanctioned military operation designed to oust from power the governing regime of the country of Afghanistan. Just as we "are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not," *Hamdi*, 316 F.3d at 474, we are ill-positioned to question the military's determination that any particular area of a country with whom we are at war is or is not an "active combat zone."

American soil, who the Executive designates an 'enemy combatant,' as long as the Executive asserts that the area in which the citizen was detained was an 'active combat zone,' and the detainee, deprived of access to courts and counsel, cannot dispute this fact." Judge Luttig also points to "[t]he embedded journalist or even the unwitting tourist" who "could be seized and detained in a foreign combat zone." And, he too claims that such a likelihood would be "far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state."

Although effective in stirring emotion, our colleagues' expressed fears are grounded in conclusions not reached or even predicted by the panel decision. Our decision does not speak to the issue of whether an "enemy combatant" may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations for purposes of the President's exercise of his Article II war powers. Rather, it addresses only the appropriate level of deference to be observed when the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime. Nor does it sanction indefinite detention, but rather contemplates detention for the duration of such hostilities.

In short, my colleagues' collective desire (albeit undertaken for much different reasons) to redefine the case before us has caused them to lose their focus on our holding. Afghanistan is an identifiable nation state and Hamdi was in a conventional war situation. Every resident within Afghanistan (including Hamdi as was explicitly alleged) was in law an enemy, until determined by the

Executive to be a friend. As Judge Wilkinson aptly observed, war is a messy business and mistakes can be made. American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one. But the circumstances of armed conflict against a foreign government in a foreign land require the deference we have shown the Executive in the making of military decisions.

III.

Despite their common criticism of our observation that Hamdi was captured in Afghanistan – and our belief that Hamdi's capture in Afghanistan guides our inquiry as to whether the Mobbs Declaration is sufficient to justify Hamdi's detention as an enemy combatant – our colleagues differ significantly in their opinions as to what kind of review is appropriate.

Judge Motz would hold that the Mobbs Declaration is *insufficient* to justify Hamdi's enemy combatant designation. And, although she disagrees that Hamdi's capture in Afghanistan is undisputed, in the end it really matters not to Judge Motz whether Hamdi was seized in Afghanistan. As Judge Wilkinson has noted, Judge Motz believes it proper for the Judiciary to litigate precisely why Yaser Hamdi was seized and whether the military capture can be justified regardless of where the seizure occurred. In short, Judge Motz "would require a greater showing from the Executive before [she] would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to

appear in court, contest the allegations against him, or consult with a lawyer." For the reasons expressed by Judge Wilkinson, I, of course, disagree.

Judge Luttig also contests our observation that Hamdi was present in Afghanistan when he was captured, but only pays lip service to Judge Motz's belief that we would have to give Hamdi access to counsel and a direct voice in an Article III court in order to determine his place of seizure. Unlike Judge Motz, it appears that Judge Luttig would in practice not give Hamdi a voice to either concede or dispute the place of seizure. Rather, Judge Luttig "believe[s]" he would adopt at most a "some evidence" standard as the appropriate level of deference due and "would likely conclude, as argued by the United States, that the facts recited in [the Mobbs' Declaration] are sufficient" to satisfy it. In other words, it seems Judge Luttig would hold that the Mobbs Declaration is *sufficient* to justify Hamdi's enemy combatant designation *regardless* of whether Hamdi admitted his presence in Afghanistan or flatly disputed it.

From this, I can only assume that Judge Luttig is really dissatisfied not because we have refused to give Hamdi a voice to raise a dispute as to his place of seizure, but because we evaluated the legal sufficiency of the government's response within the context of Hamdi's capture in Afghanistan. Thus, Judge Luttig charges, by "refus[ing] to rest decision on the proffer made by the President of the United States" and instead "rest[ing] decision on a putative concession by the detainee," we have "all but eviscerate[d] the President's Article II power to determine who are and who are not enemies of the United States during times of war." He accuses us of "disown[ing] [our] promise to the Executive to accord him

the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States," and predicts that our rule "will henceforth . . . cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee." "[I]n every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," Judge Luttig laments, "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Such hyperbole is not only unwarranted, it is plainly wrong.

Judge Luttig's first misrepresentation lies in his characterization of our opinion as holding that "more is 'unnecessary to a meaningful judicial review' of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone." We have held no such thing, nor can such be fairly read from our opinion. The inaccuracy of this "paraphrased rendition" of our holding is readily apparent. The language quoted by Judge Luttig from the panel opinion is excised from the following passage from our opinion which follows an extensive discussion of the contents of the Mobbs Declaration and the practical problems of active judicial supervision of combat operations overseas:

> [B]ecause Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and . . . is consistent with the

> Constitution and laws of Congress. *Asking the executive to provide more detailed factual assertions* would be to wade further into the conduct of war than we consider appropriate and *is unnecessary to a meaningful judicial review* of this question.

Id. at 473 (emphasis added) (citations omitted). Obviously, we did not hold that Hamdi's concession of seizure in a foreign combat zone rendered further judicial inquiry into an enemy combatant designation unnecessary. For the constitutional and practical reasons extensively discussed in the opinion, we held that Hamdi's presence in a war zone when seized rendered judicial inquiry *beyond* the legal sufficiency of the government's response unnecessary to a meaningful judicial review.

Indeed, we expressed *no* opinion as to whether the Mobbs Declaration was more than sufficient or just enough to ensure meaningful judicial review of the Executive's detention of an American citizen in an enemy country as an enemy combatant. The submission of the Mobbs Declaration was not directed by the Judiciary. Rather, the government voluntarily opted to provide, under oath, a level of information it believed to be legally sufficient to justify detention of an American citizen captured during the course of armed conflict in a foreign theater of battle, and asked us to respect the balance of powers and accept it as sufficient to warrant dismissal of the petition before us. And, we did indeed accept the Executive's voluntary proffer as sufficient. We took care not to make grand pronouncements as to what we might do in a different case, and even went so far as to expressly discourage any propensity on the part of others to view our decision as moving beyond the set of circumstances before us. Judge

Luttig decries what he believes to be a "Pyrrhic victory" for the government, but it has lost nothing. Even if we assume that the government sought such a broad holding, the most that can be said is that they did not get all they wanted and must seek it elsewhere.

Judge Luttig's second misrepresentation comes in the form of the prediction that, as a result of our opinion, "in every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Our opinion says no such thing. We held that the Mobbs Declaration was sufficient to allow meaningful judicial review of Hamdi's detention because he was within a hostile country when captured. We did not predict what would constitute meaningful judicial review of the detention of an United States citizen in cases in which the place of seizure is unknown or alleged to be within a country with whom we are not actively at war. Although we left open the possibility that the place of seizure might require further factual inquiry depending upon what representations the government provided, we did not hold that extended judicial review of the Executive's determination *that one is an enemy combatant* would become appropriate merely because a dispute existed *as to the place of capture.* Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case. Our opinion dealt, as it should, with the precise situation before us.

IV.

Finally, while I fully recognize that we have not gone as far as Judge Luttig would have us go, I take umbrage at his charge that this panel, as a result of "decisional paralysis," has "retreated" from its constitutional duty to decide this case based upon the facts presented and, instead, has fabricated a fact to ease our task. Nothing could be further from the truth. The government makes no such charge, no doubt cognizant that, in accordance with time-honored principles of constitutional decision-making, we have gone no further than necessary to resolve the delicate balance of constitutional interests before us. *See Poe v. Ullman*, 367 U.S. 497, 503 (1961) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of strictest necessity.") (quoting *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1947)); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885)); *id.* ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"). *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Nor, for that matter, does the petitioner, who argues not that Yaser's presence in Afghanistan was a matter of dispute, but only that we should not as a legal matter rely upon the allegations of the petition and the representations of the petitioner for the premise that Yaser was in an active combat zone within that country.

Nor is it fair to say that we "retreated to ground that . . . neither party attempted to defend." The government has recognized the significance of the place of capture from the outset of this case, arguing to us that "[t]he military determination at issue in this case – the decision to detain someone who was armed with an assault rifle when he surrendered *in a combat zone* as part of an enemy unit – directly implicates the national defense, not to mention the safety of American soldiers still stationed *in the zone of conflict*, and falls at the heart of the military's ability to conduct war." Respondents' Brief at 27. So has the petitioner, who has repeatedly disclaimed any intent to challenge a battlefield seizure in Afghanistan, but only Hamdi's current detention in the United States.

This case was presented to us on appeal from the district court's order finding that the Mobbs Declaration was insufficient to allow meaningful judicial review of Hamdi's classification as an enemy combatant. We held that the Mobbs Declaration provided by the government in response to the habeas petition was sufficient to uphold Hamdi's detention as an enemy combatant under the President's wartime powers. We have upheld the President's Article II power as Commander in Chief of the armed forces to defend this country from its enemies and to determine who are and who are not enemies of the United States within countries where we are engaged in active hostilities.

Yaser Hamdi's status as an American citizen entitles him to petition the Judiciary personally, or by next friend if he cannot for reasons of national security, for habeas relief and thereby to demand a response from the Executive as to why the detention is an acceptable utilization of his Article II powers. In the exercise of our Article III

powers, we review that response and may consider any legal arguments as to why the detention does not comport with a lawful exercise of war powers. Because Hamdi was within a country with whom we were fighting when he was seized, principles of separation of powers and practicalities of armed conflict dictate that we defer to the Executive's determination as to who is foe and who is not. Hamdi may test the legal basis for his detention. But, beyond that, Hamdi may be held, not indefinitely, but for the duration of active hostilities just like other non-citizen detainees captured in an enemy country by our military forces making a battlefield determination that the person detained was there to take up arms against our soldiers. And, in the holding most overlooked but most directly applicable to the claim as it was filed and argued before us, Hamdi's transfer by the military from the enemy country to Guantanamo Bay and then to the United States did not result in a greater right to challenge his designation.

In the end, Judge Luttig complains not because we accepted the Mobbs Declaration as sufficient and, thereby, granted the President the deference he sought from us. Rather, he complains because we have not forecast a similar level of deference in other contexts by adopting a global standard of review for all Executive detentions undertaken in the "war against terror." But, in order to reach this broader holding, he must attempt to find fault with our observation that Hamdi was in Afghanistan when seized, and he must characterize, however inaccurately, our opinion as resting *solely* upon that observation.

The impropriety of reaching beyond this case to decide another is, in my view, quite obvious. Judge Luttig opines that he would probably adopt the "some evidence"

standard advanced by the government and hold that the Mobbs Declaration would be sufficient even in the face of a factual dispute as to whether Hamdi was in Afghanistan. That question, however, does not merely raise a single difficult issue, as posited by Judge Luttig, as to what the global standard should be for this and other cases. Rather, it raises many difficult issues related to the President's Article II wartime powers and how they will ultimately be interpreted in an age of terror. And, no matter how interesting such questions may be, they are simply not before us. We are not dealing with the President's designation of Hamdi as an enemy combatant because he is a terrorist in the "war against terror" declared after the tragic events of September 11, 2001. Had Hamdi's petition been grounded in an allegation that he was seized in France under the auspices of the "war against terror," and had the military agreed to that allegation and designated him an enemy combatant, then we would have a much different case. Had Hamdi's petition been grounded in an allegation that he was seized in the United States under the auspices of the "war against terror," and the government agreed, then we would have a case not unlike *Padilla v. Bush*.[10] In both hypothetical situations, we might well be called upon to weigh other important national security interests. Whereas we would not likely face the dilemma of pulling military commanders out of the theater of war to testify in a court of law, for example, we would likely encounter such issues as whether France or the United States is a "zone of active military operations" and, if not, whether such

[10] *See Padilla v. Bush*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

seizures in a noncombat country can be a valid exercise of the Executive's Article II war power.

I need express no opinion on such issues because they are not before us. As the government's response to the petition makes clear, we are dealing with the President's designation of Hamdi as an enemy combatant in the war against Afghanistan with the stated goal of ousting the Taliban regime in order to end its support for Al Qaida and other terrorist networks. The conflict in Afghanistan is certainly related to the global conflict referred to as the "war against terror," but it is unquestionably a military conflict that falls quite neatly within our historical concepts of war. The questions Judge Luttig wishes to address might include some of the more novel, complex, and interesting ones a court could be called upon to contemplate, but no matter how much we might like to deal with them, they are not before us. We should not reach beyond this case to decide them.

LUTTIG, Circuit Judge, dissenting from denial of rehearing en banc:

As should be true under a rule of law, the reasoning underlying our resolution of the important issue presented by this appeal has implications beyond the particular dispute before us. In this instance, those implications are for no less commanding constitutional interests than the President's power to conduct war and the right of our citizens to be free from governmental restraint except upon lawful justification.

As my colleagues have recognized, the panel's opinion resolving the important issue presented by this suit is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's

seizure as "undisputed," when those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances. That the panel opinion is unpersuasive is borne out by no less significant a fact than that the panel itself, as evidenced by the two separate concurrences today, cannot even now agree as to either the proper interpretation or defense of its opinion.

Additionally, beyond the opinion's unpersuasiveness, its refusal to rest decision on the proffer made by the President of the United States, and its insistence instead upon resting decision on a putative concession by the detainee, has yielded reasoning that all but eviscerates the President's Article II power to determine who are and who are not enemies of the United States during times of war.

Because of the facial unpersuasiveness of the court's opinion, and because the opinion of law that resolves the issue raised in this appeal is of even greater constitutional importance than the result reached by that opinion, I would grant the requested rehearing *en banc*. I believe that the significance of the issue that has been presented calls for an opinion from this court that directly addresses that issue and resolves it unambiguously and convincingly (however broadly or narrowly), based upon the facts as they appear in the record and the arguments as they have been well made by the parties.

I.

On the central question presented in this case, it is evident that the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting

his designation by the Executive as an enemy combatant, under any standard of review urged by those who appeared on behalf of Hamdi. However, the panel was equally unwilling either to adopt the "some evidence" standard and accept as sufficient under that standard the facts offered by the government as justification for Hamdi's seizure or to hold that the Judiciary is without all authority to review the President's designation of an individual as an enemy combatant, as alternatively urged by the government. Faced with this decisional paralysis, the panel retreated to ground that not only neither party attempted to defend, but that is transparently indefensible – holding that Hamdi cannot challenge, and the court cannot question, the facts proffered by the government in support of Hamdi's particular seizure and detention as an enemy combatant, for the asserted reason that Hamdi has *conceded* that he was seized in a foreign combat zone.

A.

In resting its decision on this factually and legally untenable ground, the panel reneged on the promises it hastily made to the parties at the litigation's inception.

It promised the citizen seized by the government "meaningful judicial review" of his claim that he was not an enemy combatant, pointedly refusing to "embrac[e] a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) ("*Hamdi II*"). But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the

facts on the basis of which the government designated that citizen as an enemy combatant.

One could hardly be faulted for wondering why, as the panel held, more is "unnecessary to a meaningful judicial review" of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone. Under even an exceedingly deferential standard of review, such, though it is relevant to, would hardly seem dispositive of whether one has been legitimately classified as an enemy combatant. The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state. But surely we would not conclude that that journalist or tourist (who could be expected to readily admit to his seizure in the foreign combat zone) had received meaningful judicial review of his claim that he was not an enemy combatant, if that claim received no judicial scrutiny at all merely because he stipulated that he was seized in that foreign combat zone. It is undoubtedly for these reasons that the Executive neither designated Hamdi an enemy combatant on the basis of his mere seizure in a foreign combat zone nor defends its designation in this court on such basis.

But as the panel disowned its promise to the detainee to provide him meaningful judicial review, so also did it disown its promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States. The panel promised the

Executive that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant of the United States, but it adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee.

Upon a moment's reflection, it is apparent that the rule of law that was fashioned by the panel professedly in the name of deference to the Executive, and that now binds us, is, in application, a rule of no deference at all. For counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant in every instance in which the petitioner but refrains from affirmative concession that he was seized in a foreign combat zone. The Executive's undeniably important interests in the prohibition of access to detained enemy combatants for reasons of national security and in the conduct of war free from fear that it will be summoned to court to answer to the Judiciary for its enemy designations, thus, are uncomfortably protected by little more than the hope (vain after the court's opinion, if not before) that the habeas petitioner will gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat.

That the government's victory is but thinly guised defeat could not be better confirmed than by the arguments that have already been made in opposition to, and in support of, the panel's opinion by the parties to this dispute. Thus, those appearing on behalf of Hamdi argue, to no surprise and in compelling understatement, that the panel fundamentally erred for the reason that, "it cannot fairly be stated that it is 'undisputed' that Hamdi was captured within a zone of active combat operations in a

foreign country" "[b]ecause Hamdi was denied the opportunity to meet with counsel, and was refused the opportunity to dispute the facts put forth by [the government] – including assertions as to where he was captured and what the circumstances were at the time." Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc, at 12-13. The obvious remedy for this error being, they reasonably claim, a remand for further factual development on the issue, with allowance for participation by Hamdi himself.

And the government, as expected, rejoins that "the type of evidentiary proceeding that appellees seek would raise precisely the same problems concerning judicial oversight of military operations overseas that the panel properly concluded is not only unwise, but unauthorized under our constitutional scheme." Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing en Banc, at 11.

A more Pyrrhic victory would be hard to conceive.

In sum, then, because of its unwillingness to confront head-on the admittedly difficult issue presented by this appeal, decide upon the standard of review required by the Constitution, and resolve the case by application of that standard to the facts proffered in justification for the Executive's designation of Hamdi as an enemy combatant of the United States, the panel succeeded in securing *neither* the guarantees of the Bill of Rights nor the powers committed to the Executive by Article II of the Constitution.

B.

These breaches perhaps could be excused if the panel had divined an unassailable narrower ground for decision than that foreshadowed by either of its bold promises. However, its decision cannot be excused on this basis, because the ground upon which the panel rested its decision is anything but unassailable. *For it simply is not "undisputed" that Hamdi was seized in a foreign combat zone.*

For its repeated assertions that this circumstance is conceded, *see Hamdi v. Rumsfeld*, 316 F.3d 450, 459, 461, 465, 473, 475, 476 (4th Cir. 2003) ("*Hamdi III*"), the panel relied solely on the petition filed by Hamdi's father as next friend. *See id.* at 460; *id.* at 461 (stating that the Mobbs affidavit "confirms the material factual allegations in Hamdi's petition"); *id.* at 474 ("Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution. . . ."). As the panel wrote,

> [i]n this case, there are two allegations that are crucial to our analysis. *First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan* . . . . Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detentions, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Id. at 471 (emphasis added). Thus, the panel opinion quite clearly rests on the petition alone for the court's conclusion that seizure in a combat zone was "undisputed."

But the next friend petition says no such thing as the panel held that it does. It states that, "[w]hen seized by the United States Government, Mr. Hamdi *resided* in Afghanistan." J.A. 9 (emphasis added). Of course, it is a *non sequitur* to conclude from the representation that Hamdi *resided* in Afghanistan at the time of his seizure, that he was also *seized* in a foreign zone of active combat. In the end, it is obvious that the panel simply missed the critical import of this distinction between residency on one hand, and seizure or capture on the other, even though it recognized – at least in passing – the distinction between the two. As it said, though incorrectly as to the latter, "Hamdi's petition alleges that he was a resident of *and* seized in Afghanistan. . . ." *Hamdi III*, 316 F.3d at 471 (emphasis added).

Insistence that the distinction be drawn between acknowledgment of residency and concession of seizure in a combat zone is not to be clever. I have no reason to believe that Hamdi was not in a combat zone at the time of his seizure, and, to the extent relevant, I believe that he was. But, as a court of law, we cannot impute a concession of this circumstance of seizure from an innocuous acknowledgment of residency in a country in which combat was underway. Such is not credible.

No more so can other statements that appear in the next friend petition and relied upon by the panel be fairly taken as concession that Hamdi was actually seized in a foreign combat zone, as opposed to acknowledgment merely that he was a resident of a country in which there was ongoing combat at the time of seizure. The panel recites that,

> [a]ccording to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance."

Hamdi III, 316 F.3d at 460. The panel apparently viewed the quoted petition passages similarly as conceding seizure in a foreign combat zone. But a careful reading of these passages reveals that neither is such a concession fairly inferable from them. Most obviously, neither passage says anything at all about *Hamdi*. But, additionally, even if they had, there is no reason to presume that every person who was held by the Northern Alliance (assuming, for the moment, that Hamdi falls within that class) was captured in Afghanistan during the course of combat operations. Of course, this may have been the case. But it also may not have been.

The final statement in the next friend petition that the panel quoted, and on which it seemingly relied, was at once materially abbreviated by the panel and materially supplemented. The materiality of both the omission and the addition is apparent when the actual quotation from the petition is read side-by-side with the panel's altered and paraphrased rendition of that quotation. The petition actually reads as follows:

> On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. In its opinion, however, the panel relates the statement in this way:

> The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" *in Afghanistan*. . . .

Hamdi III, 316 F.3d at 460 (emphasis added). Thus, terribly significantly given that the panel's opinion rests on the "undisputed" nature of the circumstance, the panel supplies a geographical location of seizure and detention that the statement in the petition just does not contain, imputing a representation as to this location to the next friend. And though it should not be necessary to put a finer point on it than this, even had the petition statement actually contained the geographical location of seizure and detention that the panel thought, the statement would not support the conclusion that the situs of seizure was conceded. For, even with this significant alteration, the statement would only admit that Hamdi was *either* "captured *or* transferred into custody," not necessarily one as opposed to the other.

In fact, upon reading the petition, it is actually apparent that it scrupulously avoids any admission as to the precise geographical point of seizure, likely because such was unknown to Hamdi's father, who filed the petition. *See* J.A. 11 (Petition: "On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. . . . On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay, where he was held until April 2002.").

Because the panel opinion relies *exclusively* upon the next friend petition for its conclusion that Hamdi was

conceded to have been seized in a foreign combat zone, and because none of the statements in that petition either concede or can be fairly read to concede seizure in such a location, the panel's opinion, which in turn rests exclusively upon such a concession, is unconvincing.

C.

Sensing the vulnerability of the panel's opinion, the concurrences in the denial of rehearing *en banc* (Judges Wilkinson and Traxler) attempt to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone. Thus, for example, Judge Wilkinson maintains, "Hamdi's own *filings* make clear that he was seized in a zone of active combat operations," *ante* at 17 (emphasis added), by which he makes reference not only to the next friend petition upon which the panel solely relied, *see, e.g.*, *Hamdi III*, 316 F.3d at 460; *id.* at 461 (stating that the Mobbs Declaration "confirms the material factual allegations in Hamdi's petition"); *id.* at 471 ("Hamdi's petition alleges that he was a resident of and seized in Afghanistan. . . ."); *id.* at 474 ("Hamdi's petition places him squarely within the zone of active combat. . . ."), but also to the new materials cited by the government in its response to the petition for rehearing, in support of the court's conclusion that the location of seizure has been conceded. In particular, excepting a letter that is admittedly "outside the legal arena" and thus obviously irrelevant, Judge Wilkinson cites to Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court and a statement by the district court. *Ante* at 17.

I have previously expressed my concern about the trend in our court to attempt "to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion, or even to fine-tune, if not fundamentally reshape, the legal analysis undertaken by the original panel, *in the course of opinions respecting the denial of rehearing en banc.*" *Jones v. Buchanan*, 325 F.3d 520, 538-40 (4th Cir. 2003) (Luttig, J., dissenting) (citing cases). Without repeating in full the reasons for this concern here, such attempted modifications are unfair to the litigants, because the parties (and the public) are bound by the panel opinion as it was written and issued, and they may obtain further review only of the issued panel opinion, without regard to modifications suggested by a concurrence in denial of *en banc* rehearing. In other words, they are bound by the only opinion of law in the case, not by the hypothetical opinion represented by the combination of the original panel opinion and purported modifications made during proceedings appealing for *en banc* reconsideration. This is not to say that explanatory concurrences in denials of rehearing *en banc* should never be written by the author of the challenged opinion or by judges who joined in that opinion; it is only to say that when such an opinion would add significant factual or legal support for the judgment reached, the appropriate course is for the panel to modify its opinion formally so as to supply the important new facts or reasoning in an opinion that then becomes the precedent for the court which may be appealed by the parties to the Supreme Court of the United States.

But putting this concern to one side, the very fact that the concurrences have felt need to offer up the additional support that they have is confirmation that the panel at

least now senses the analytical softness of its opinion. There would otherwise be no reason to attempt to shore up that opinion with these additional materials, which the panel fully considered originally and rejected as not providing any support for its conclusion that the location of seizure was "undisputed."

In any event, apart from their irrelevancy now as a matter of law given that they were not relied upon in the panel opinion, these additional materials, as the panel originally concluded, do not any more prove an affirmative concession that Hamdi was captured in a foreign combat zone, than do the statements contained in the petition filed by the next friend – even if, in combination with that sole filing relied upon by the panel, they render the case slightly closer.

Judge Wilkinson quotes from a traverse filed in the district court which reads that the petitioner's claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." J.A. 64. Much like the acknowledgment of Hamdi's place of residence, the observation that Hamdi's claim does not implicate his initial *detention* does not, and certainly should not in a court, say anything about where he was originally *seized* – at least not necessarily. As does the law, these parties themselves distinguish between seizure and detention throughout their submissions. If there were any doubt as to the inappropriateness of drawing such an irrebuttable inference as to place of seizure from place of detention in this instance, it should be put to rest by the fact that that very same traverse filing states that "[p]etitioner in no way concedes that Respondents' factual assertions are true." J.A. 65 n.1. Indeed, it even specifically states that "information about Petitioner Hamdi prior to his transfer to the custody of

[the government] is based on the hearsay of unknown members of the Northern Alliance." *Id.* The other materials with which the concurrences now attempts to support the panel's opinion suffer from the same flaw, as they too speak only as to the place of detention, not the place of seizure.

Thus, neither the panel nor even the concurrences after the fact, adduce a single statement from Hamdi's petition or any other filing in this case in which there appears a concession that Hamdi was captured or seized in a foreign zone of active combat operations. A single example suffices to show the extent of the reach attempted by the panel. The concurrences now cite even to a defense counsel's single word of agreement with a statement made by the district court that Hamdi was "in a fighting situation." *Ante* at 17-18 n.2 (citing Tr. of Aug. 13, 2002 district court proceedings). Not only is this single word of agreement with this statement made by the district court ambiguous on its face, it is followed by defense counsel's statement – omitted by the concurrences – that "what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured. . . . We don't know what happened." J.A. 394.

D.

But more important than the substantive content of any of these several oblique references marshaled by the concurrences in *en banc* denial is their source. These statements, however they are interpreted, are not from Hamdi or from counsel acting on his behalf. They are from Hamdi's father, acting as next friend, who, it has been

represented to us, has not even had any contact with his son since the latter was seized over a year ago. As Judge Motz recognizes, even an unambiguous concession as to the location of Hamdi's seizure in such a third party submission cannot, as a legal matter, bind Hamdi to a fact that in turn is deemed dispositive of his claim for freedom.

In no sense, then, is the place of Hamdi's seizure "undisputed" by the parties to this suit. An opinion that rests exclusively on the premise of a stipulated agreement as to this circumstance of seizure, as does the panel's, is simply unconvincing. And it is rendered no more convincing, even if it is thought more palatable, by the fact that resting decision on this ground permits superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant, *see Hamdi III*, 316 F.3d at 465 (citing and distinguishing *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)), which case the panel feared might unavoidably be reached by a decision on the issue as presented and under the facts as proffered.

E.

Judge Traxler writes extensively in defense of the panel opinion, although, beyond embracing the materials newly cited by Judge Wilkinson, he does little more than repeat at length the panel's reasoning (where needed, embroidering upon that opinion for himself), and quote liberally from this and Judge Motz's opinion. But the juxtaposition of the particular defenses that he chooses to make, with their obvious responses, all but confirms to the careful reader the shortcomings in the panel's opinion. It is undoubtedly for this reason that Judge Traxler's

co-panelists, who, with him, jointly authored the original opinion, do not align themselves with him today.

1.

To begin with the most significant, Judge Traxler, though writing to bolster the panel's conclusion that the place of seizure in a foreign combat zone was in fact conceded in the next friend petition, actually ends up admitting that the petition itself does *not* explicitly concede seizure in such a zone. *See, e.g., ante* at 23-24 ("Judge Luttig correctly observes that the habeas petition does not *explicitly* state that 'Hamdi was captured in a zone of active combat in a foreign theater of conflict.'"); *id.* at 23 (stating that "the petition[] fail[s] to affirmatively state that Hamdi was captured in a foreign combat zone"). This is an admission of no small consequence, of course, for the panel relied entirely upon the existence of such a concession of capture in a foreign combat zone in the petition, and the opinion plainly regarded this concession as having been made explicitly and unequivocally. Certainly, until today, the reader would have never thought otherwise. Nowhere, for instance, is there even the slightest suggestion that the panel regarded this dispositive concession as merely "implicit." And there certainly is no mention of any inferential steps of which one would expect explanation before a dispositive concession is implied by a court.

By this candid admission alone, Judge Traxler has made out the case against the panel's opinion better than have either Judge Motz or myself. For if, as Judge Traxler says, this is a "momentous" case, then he has now confirmed that it was dismissed on the basis of a concession believed by the panel (though disputed by the parties) to

have been made only "implicitly," and at that, by a third party to the action who not only had had no contact whatsoever with the petitioner himself, but who even disavowed that he could speak to the facts except upon information and belief.

Unwittingly compounding further the analytical problems that beset the panel's opinion as it is written, Judge Traxler next attempts to marshal for the first time support for what was the panel's assumed, but wholly unsupported, holding that a next friend may concede facts sufficient to conclude a litigation when the detainee is inaccessible to the next friend by reason of the respondent's own actions. All that need be said as to this effort is that, after now critically addressing himself as a single judge to the proposition that the panel originally uncritically assumed, Judge Traxler is able to cite only a single case and that of a district court almost forty years ago. *See ante* at 29 (citing *Hall v. Hague*, 34 F.R.D. 449 (D. Md. 1964)). *And not even that case holds that a next friend may concede the facts that will lead to the dismissal of the plaintiff's suit in circumstances anywhere approaching those presented by this case.* Thus, on this score as well, has Judge Traxler made the case for dissent better than have either Judge Motz or myself.

Judge Wilkinson, to his credit, recognizes as much, and attempts to salvage the panel opinion on this critical point by asserting that "ordinary civil [and] criminal litigants" *cannot* be bound by next friend concessions, but that Hamdi *must be so bound*, for the reason that he allegedly was seized in a foreign zone of active combat operations. *See ante* at 17-18 n.2. But in attempting the salvage, Judge Wilkinson himself comes very close (although he does not realize it) to outright conceding the

indefensibility of the point, because the binding character of a next friend concession obviously does not turn upon whether the concession is or is not made on behalf of an individual allegedly seized abroad, or even an individual seized abroad in a foreign theater of battle. Nor does the separation of powers have anything to do with this necessary legal fact. And even if the binding character of a next friend concession somehow did turn upon the location of the petitioner's seizure, the principle would cut in precisely the opposite direction from that believed by Judge Wilkinson: the alleged concession might be binding upon one seized domestically with whom the next friend is in unfettered contact, but presumptively would never be binding upon one seized abroad and held incommunicado.

In tacit recognition that these belated arguments as to the fact of concession and the legal acceptability of third-party fact concessions ring hollow, Judge Traxler (notably speaking only for himself) suggests finally that the panel would have reached the same outcome in this case even had it not concluded that the place of seizure was undisputed. *See ante* at 37 ("Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case."). I do not know quite how to respond to this statement, because I am in no position to say that, irrespective of what the panel wrote, it would not have decided the case differently had it concluded that the location of seizure was disputed. All that I, the parties, and the public can do is reason inferentially from the opinion for the court, which the panel did write. And based upon that opinion, while Judge Traxler may now in hindsight characterize the supposed concession by Hamdi's next friend as insignificant, the panel opinion he co-authored treats it as

anything but. The opinion well speaks for itself in rebuttal to this suggestion. Said the panel, in emphasized words that Judge Traxler would have us overlook today, the concession of seizure in a combat zone made in the petition is "crucial to our analysis." *Hamdi III*, 316 F.3d at 471.

Thus, while Judge Traxler may now want to say that the panel would decide the case no differently absent a concession, he is faced with self-contradiction to so maintain, given that the opinion he co-authored went out of its way to denominate as "crucial" to its analysis the concession that it mistakenly believed was made. The unavoidable inference to be drawn from such a characterization of fact dispositively relied upon is not, as Judge Traxler would now have it, that absent that fact, the disposition would still be the same, but rather, that the disposition reached on the strength of that fact quite likely would be different if the fact were otherwise.

2.

Unable to shore up the foundation of the panel's opinion, that Hamdi's next friend conceded that Hamdi was seized in a zone of active combat operations and bound Hamdi to that fact, Judge Traxler attempts to shift the focus away from the panel's opinion and the ultimate legal issue entirely, by erecting and then attacking a series of straw man arguments he ascribes to this dissent. Thus, he suggests that I argue that the facts alleged in the petition should be taken as false, *ante* at 27-28, and that I am "attempt[ing] to rewrite the case history and the substance of the habeas claim," *ante* at 28. Of course, I make no such arguments. I make the simple point that the petition does not affirmatively concede capture in a foreign

combat zone, a fact that Judge Traxler now admits, *see ante* at 23.

Judge Traxler next argues that I have unfairly stated that neither party has attempted to defend the significance of the place of capture, *ante* at 37-38. Again, I make no such statement. What I have stated is that neither party assigned any legal significance to the argument relied on by the panel that the locus of capture was "undisputed." (And, given the record as I have recited it herein, it is unsurprising that they did not.) But to remove the source of my objection from all doubt, and as I explain more fully below, it is *not* the panel's reliance on the place of capture that troubles me. Rather, it is the panel's indefensible reliance on an assumed concession by the petitioner, as opposed to a proffer by the government, to establish this "fact."

In his final attempt to shift the focus to a criticism that I have not made, but to which response is easier, Judge Traxler asserts that I am criticizing the panel for issuing a narrow, as opposed to a broad, holding. *See ante* at 37. As I have quite clearly said, however, the panel's error in my view was not in its search for a narrower ground, but rather in the unpersuasiveness of the putatively narrower ground on which it ultimately relied – a concession by Hamdi as to the place of his seizure. Not only is this narrower ground of concession factually unpersuasive, it is also unpersuasive as a matter of law, for the reasons Judge Motz and I have set forth.

3.

When all is said and done, then, Judge Traxler's writing today both confirms the vulnerabilities inherent in

the panel's opinion he seeks to defend and puts the lie to the panel's assertion that, by grounding its decision on the reputed concession by Hamdi's next friend, it *both* provided Hamdi meaningful judicial review *and* protected the President's Article II powers to determine who and who are not enemies of the United States.

As to the former, not only does he admit that there is no such explicit concession as the panel believed, but he is forced as well to acknowledge that there is not even legal support for the panel's unexamined supposition that a next friend can actually concede a dispositive fact without even the petitioner's knowledge. As to the latter, his analytical admissions betray well that Hamdi was not provided the meaningful judicial review that he was promised. And, through his attempt to discount the importance of the supposed concession to the panel's disposition, he only draws attention to the pivotal importance of that supposed concession and thereby to the trifling deference the panel accorded the President of the United States in his determinations of who constitute enemies of our Country. A more forceful explanation of the grounds for dissent I could not make.

II.

Because of the overarching importance of the opinion of law that resolves the issue presented by this appeal, because of the panel opinion's dismissiveness of the substantial interests at stake in this case for both citizen and government, and because of the analytical vulnerability of the court's opinion as it stands, I believe that both the United States and the petitioner would be served by reconsideration by our full court.

Upon reconsideration, we should decide the critical issue of the appropriate standard that is to govern the Judiciary's review of an individual's challenge to an Executive designation of enemy combatant status, the indecision of which by the panel I believe fails to serve the substantial interests of not only the parties but also the public in the resolution of this issue. Having decided the governing standard, we should decide the issue of whether that standard has been satisfied in this case by the government's proffer of the facts contained in the Michael H. Mobbs affidavit, the like indecision of which by the panel also, I believe, fails to serve the parties and the public.

III.

Although I reserve ultimate judgment because of the difficulty of the issue and because I write in dissent from the request to rehear the case and therefore without the benefit of argument, I believe, as to the standard of review, that the government may be correct that

> [p]roper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in [*Ex parte*] *Quirin*[, 317 U.S. 1 (1942)] and [*In re*] *Territo*, [156 F.2d 142 (9th Cir. 1946),] and raised by the petition in this case. At most, however[ ] . . . a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant.

Br. of Respondents-Appellants at 28 (internal citation omitted); *see also id.* at 36 ("[T]o prevail under a

constitutionally appropriate standard, the government would at most need to provide some factual basis for supporting the military's determination that Hamdi is an enemy combatant."). That is, I believe that the President of the United States may well be entitled under the Constitution to receive from the Judiciary the deference afforded by a standard selected from those along this continuum, when, in exercise of the powers conferred upon him by Article II of the Constitution, he designates a person as an enemy combatant against this Nation.

As to the application of the standard to the facts proffered by the government in support of the Executive's designation of Hamdi as an enemy combatant, I reserve ultimate judgment for the same reasons. I am prepared to say, however, that I would likely conclude, as argued by the United States, that the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard for the President's designation of an enemy of the United States.

This affidavit states that Hamdi traveled to Afghanistan in the summer of 2001, where he promptly affiliated with a Taliban military unit and received weapons training. It further states that during a battle between the Taliban and the Northern Alliance later that year, Hamdi's Taliban unit surrendered to Northern Alliance forces. It continues that Hamdi was directed to surrender his Kalishnikov assault rifle (*i.e.*, AK-47) to Northern Alliance forces and was subsequently imprisoned. The affidavit represents that, while in prison, Hamdi was determined by the United States military screening team to meet the criteria for enemy combatants over whom the United States was taking control. And finally, the affidavit relates

that in January 2002, a Detainee Review and Screening Team established by the Commander of the United States Central Command reviewed Hamdi's record and determined again that he met the criteria established by the Secretary of Defense for individuals over whom United States forces should take control and transfer to Guantanamo Bay.

In addition to these declarations made under penalty of perjury by the appointed representative of the government, the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security.

The panel's contrary holding notwithstanding, I suspect that more than this would be unnecessary to affirm the President's decision to designate Hamdi an enemy of the United States.

In all events, I believe that it is the obligation of this court to decide these issues that have been presented to us by the United States and by one of its citizens. At times, judicial avoidance of the difficult and the politically charged is the more prudent and the more faithful to the judicial role, both. This is a case in which it is neither.

* * *

For the reasons set forth, I would grant the suggestion for rehearing *en banc*. Accordingly, I respectfully dissent from the court's denial of that suggestion.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing en banc:

For more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He has not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world.

Precedent dictates that we must tolerate some abrogation of constitutional rights if Hamdi is, in fact, an enemy combatant. However, a panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs – an unelected, otherwise unknown, government "advisor," – "standing alone" (subject to no challenge by Hamdi or court-ordered verification) is "sufficient as a matter of law to allow meaningful judicial review" and approval of the Executive's designation of Hamdi as an enemy combatant. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). I cannot agree.

To justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, the panel allows appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case *en banc*.

I.

The panel's decision marks the first time in our history that a federal court has approved the elimination

of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.

The rights provided in the Constitution to each American citizen include the right to due process of law and to petition for a writ of habeas corpus. U.S. Const. amend. V; art. I, § 9. Unquestionably, the availability of habeas relief extends to detention pursuant to the Executive's military authority. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Just as clearly, the responsibility for ensuring that individuals detained by the Executive receive the due process guarantees of the Constitution, including the right to petition for habeas corpus, rests with the courts. *See In re Yamashita*, 327 U.S. 1, 9 (1946). As the Supreme Court has explained, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling v. Constantin*, 287 U.S. 378, 401 (1932); *see Duncan*, 327 U.S. at 322-23; and the "government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722 (1991).

The panel acknowledges as much, conceding that "[t]he duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict" and that "detention of United States citizens must be subject to judicial review." *Hamdi*, 316 F.3d at 464. Further, the panel recognizes that Hamdi, "an American

citizen currently detained on American soil," is entitled to petition for a writ of habeas corpus and that habeas proceedings "naturally contemplate[] the prospect of factual development." *Id.* at 470, 473. The panel even recognizes the inadequacy of the sole "evidence" the Executive has proffered to support its enemy combatant designation of Hamdi – the Mobbs declaration – for it admits that "a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency." *Id.* at 473. Yet, the panel concludes that "no . . . factual inquiry on our part is necessary or proper" and that "Hamdi is not entitled to challenge the facts presented in the Mobbs declaration." *Id.* at 473, 476.

The panel suggests that this conclusion accords with precedent. *See id.* at 475 ("this same issue arose in *Quirin* . . . the *Quirin* principle applies here"). In fact the Supreme Court has *never* held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, *Ex Parte Quirin*, 317 U.S. 1 (1942), the Court did hold that for a violation of the laws of war, even an American citizen could be treated as an "enemy combatant" and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*

Thus, in *Quirin*, a German-born soldier, who claimed to be an American citizen, stipulated that after receiving payment by the German government and instruction by the "German High Command to destroy war industries and war facilities in the United States," he and six other

German soldiers secretly landed in the United States during World War II with "a supply of explosives." *Id.* at 20-21. Only after finding that these "conceded facts" demonstrated "plainly" that the soldiers were within the "boundaries of the jurisdiction of military tribunals," did the Supreme Court reject their contention that they could not be tried by a military commission. *Id.* at 46. Critical to the case at hand, the Court first expressly rejected the Executive's argument that the soldiers, "must be denied access to the courts because they are enemy aliens who have entered our territory." *Id.* at 24-25. Instead, each of the soldiers was permitted, with the assistance of counsel, to file his *own* (not a next friend) petition for a writ of habeas corpus, which the courts reviewed to ensure that each soldier was in fact an enemy combatant. *Id.*

None of the few other Supreme Court cases addressing the rights of enemy combatants involved American citizens. But even when dealing with the claims of German and Japanese citizens detained by military authorities outside the United States during World War II, the Court has never suggested that an enemy combatant is without recourse to challenge that designation in court. On the contrary, the Court has held that a resident alien – who, the Court specifically noted, has far less status than those, like Hamdi, who enjoy the "high privilege" of citizenship – *can* challenge the Executive's designation of him as an enemy. *Johnson v. Eisentrager*, 339 U.S. 763, 770, 775 (1950) (internal quotation marks and citation omitted). As the Court explained: *"Courts will entertain his plea* for freedom from Executive custody only *to ascertain* the existence of a state of war and *whether he is an alien enemy." Id.* at 775 (emphasis added); *see also id.* at 784-85; *Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948) (noting

that "whether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts"); *Yamashita*, 327 U.S. at 8 (noting that "[t]he courts may inquire whether the detention complained of is within the authority of those detaining the petitioner" and "the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power" to inquire whether the "Constitution or laws of the United States withhold authority" from a military tribunal).

Moreover, the Supreme Court has upheld the Executive's designation of a person as an enemy alien or enemy combatant only when presented with *facts* supporting this designation – facts stipulated by the petitioner with the advice of counsel, as in *Quirin*, or facts proved by the prosecution at a military trial in which the petitioner was afforded counsel, as in *Yamashita*. In the case at hand, no facts have been presented to support the Executive's designation. The Executive has not permitted Hamdi to consult with counsel or challenge the allegations contained in the Mobbs declaration. And Hamdi has certainly not stipulated to anything. Denied the most basic procedural protections, Hamdi could not possibly mount a challenge to the Executive's designation of him as an enemy combatant. Yet in *Eisentrager*, *Ludecke*, and *Yamashita* the Supreme Court has explained that even aliens are entitled to precisely this right. Thus, far from supporting the panel's position, controlling precedent prohibits its approach.

II.

Without any acknowledgment of its break with precedent, the panel embarks on a perilous new course – approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as "incomplete[]" and "inconsisten[t]" hearsay. *Hamdi*, 316 F.3d at 473. My good colleagues' opinion, although well-intentioned and replete with compelling declarations of separation-of-powers principles with which no one would quarrel, utterly fails to set forth an adequate rationale for its breathtaking holding.

Indeed, the panel offers only a single justification for its unprecedented decision to permit the Executive to support its designation of Hamdi as an enemy combatant with pure hearsay: Hamdi's capture in a "zone of active combat" was assertedly "undisputed." *See Hamdi*, 316 F.3d at 459 ("*Because it is undisputed* that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold the submitted declaration is . . . sufficient." (emphasis added)); *id.* at 476 ("Hamdi is not entitled to challenge the facts presented in the Mobbs declaration," because he "has been designated an enemy combatant and *it is undisputed* that he was captured in a zone of active combat operations abroad." (emphasis added)). According to the panel, this apparently all-important fact is "undisputed" because "Hamdi's petition places him squarely within the zone of active combat." *Id.* at 474; *see also id.* at 460-61.

This is a thin reed on which to rest abrogation of constitutional rights, and one that collapses entirely upon

examination. For Hamdi has never been given the opportunity to dispute any facts. The "facts" as to the place of Hamdi's "capture" could only be "undisputed" by reliance on a facially innocuous statement in a petition filed by Hamdi's father, as his "next friend." Thus, the panel determines that a petition filed by a next friend on behalf of, but without access to or consultation with, the petitioner constitutes a binding admission by the petitioner that results in the forfeiture of the petitioner's constitutional rights. This holding flatly contravenes venerable Supreme Court precedent. The Court long ago held that "a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of" the represented party. *Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890); *see also White v. Miller*, 158 U.S. 128, 146 (1895) (same); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940) (collecting cases).[1]

[1] Judge Wilkinson contends in his concurrence to the order denying rehearing *en banc* that these cases do not apply to Hamdi because he is an enemy combatant who is not entitled to rights "enjoyed by ordinary civil or criminal litigants." *See ante* at 17-18 n.2. This reasoning is dizzyingly circular. The panel relied heavily on an admission of Hamdi's next friend (who had no opportunity to consult with Hamdi) to find Hamdi an enemy combatant. Now, Judge Wilkinson maintains that *because* Hamdi is an enemy combatant, *White* and *Kingsbury* do not apply, and Hamdi is bound by his next friend's assertedly critical admission. *Id.* Thus, Judge Wilkinson seeks to use the panel's conclusion (that Hamdi is an enemy combatant) to justify the panel's improper reliance on an admission of Hamdi's next friend, which provides the very basis for that conclusion. In sum, according to Judge Wilkinson, because Hamdi's next friend made a purportedly devastating admission, Hamdi forfeits all rights to challenge that admission, and ultimately all constitutional rights. Surely this does not constitute the "meaningful judicial review" that the panel promised. *See Hamdi*, 316 F.3d at 462, 473.

(Continued on following page)

Just as importantly, even if the statement in his father's petition that "[w]hen seized," Hamdi "resided in Afghanistan," J.A. 9, somehow translated into Hamdi's admission that he was captured "in a zone of active combat," *Hamdi*, 316 F.3d at 459, this should not render the Executive's designation of enemy combatant status irrebuttable. The ramifications of such a holding are chilling. Pursuant to the panel's decision, for example, any of the "embedded" American journalists covering the war in Iraq or any member of a humanitarian organization working in

Nor does the district court opinion, *Hall v. Hague*, 34 F.R.D. 449 (D. Md. 1964), relied on by Judge Traxler in his concurrence, *ante* at 29, offer support for the panel's startling approach. In *Hall*, a district judge merely determined that the guardian *ad litem* of a minor could admit certain housekeeping matters prior to trial, on the understanding that "[a]*t the trial*, the judge will be able to tell if any unjustified admissions have been made and take appropriate action." *Id.* at 449-50 (internal quotation marks and citation omitted) (emphasis added). This is a long way from holding, as the panel does (ignoring *Kingsbury* and *White*), that a statement in a petition filed by Hamdi's next friend constitutes an admission by Hamdi providing the basis for denial of his constitutional rights and indefinite imprisonment, *without the benefit of any trial*. Indeed, Judge Traxler's assertion that "there is no reason to believe that [Hamdi's] rights are being bargained away or that a factual mistake is being made," in the next friend petition, *ante* at 29 n.7, ignores the obvious. How could there be any "reason to believe that rights are being bargained away or that a factual mistake is being made" when the only person who could offer such a reason or contest a factual mistake – Yaser Esam Hamdi – has never been given the chance to do so? By keeping Hamdi imprisoned incommunicado, the Executive has denied him this opportunity. Thus, we simply have no idea whether his "rights are being bargained away" or "a factual mistake is being made." It is precisely to avoid resolving an individual's fate on such uncertain grounds that the Supreme Court has held that a next friend petition "cannot be excepted to for insufficiency, nor can any admission . . . be binding." *White*, 158 U.S. at 146.

Afghanistan,[2] could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an "enemy combatant." Indeed, under the panel's holding, any American citizen seized in a part of the world where American troops are present – *e.g.*, the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely without being charged with a crime or afforded legal counsel, if the Executive asserted that the area was a zone of active combat.[3] Thus, the only basis for relying on a hearsay declaration to approve the Executive's designation of Hamdi as an enemy combatant, *i.e.*, Hamdi's assertedly "undisputed capture[] in a zone of active combat," is in truth a chimera and certainly provides no justification for the panel's extraordinary holding.

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[2] I note that in a letter to Senator Patrick Leahy, contained in the record, but ignored by the panel, Hamdi's father, in fact, states that his son went to Afghanistan less than two months before September 11, 2001 to do "relief work," was "trapped in Afghanistan once that military campaign began," could not have received military training, and was never an enemy combatant. J.A. 153-54.

[3] I find puzzling the contention that the panel opinion "does not speak to the issue of whether an 'enemy combatant' may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations," *ante* at 36-37. First, no basis is provided for distinguishing between the "troops . . . still on the ground in Afghanistan," *Hamdi*, 316 F.3d at 476, and American troops "on the ground" in the former Yugoslavia, the Philippines, or Korea. Moreover, in suggesting that a person detained in one of those countries might be able to challenge the Executive's designation of that country as a zone of active military operations, the concurrence necessarily implies that the question of what constitutes such a zone is justiciable – a conclusion seemingly at odds not only with the panel opinion, *see* 316 F.3d at 476 (dismissing Hamdi's contention that hostilities in Afghanistan had ended), but also with the concurrence itself. *See ante* at 32 n.9.

Nor, as the panel implicitly acknowledges, does the two-page, nine paragraph Mobbs declaration by itself, provide such justification. The panel's assessment of the Mobbs declaration is entirely accurate; that declaration could indeed be easily and successfully "challenge[d]" as "hearsay," and "probe[d]" for "incompleteness or inconsistency." *Hamdi*, 316 F.3d at 473.[4] The declaration contains no indicia of reliability except for Mr. Mobbs' oath – which seems of minimal value given that Mr. Mobbs does not claim *any* personal knowledge of the facts surrounding Hamdi's capture and incarceration. Rather Mr. Mobbs states that his "familiar[ity]" with "the facts and circumstances" surrounding Hamdi's capture, is "[b]ased upon" his review of undisclosed and unenumerated "relevant records and reports." J.A. 61. In fact, Mr. Mobbs himself did not (perhaps could not) make the determination that Hamdi is an "enemy combatant." Instead, Mr. Mobbs can merely declare that, according to "records and reports," "Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants." J.A. 62. The Mobbs declaration does not even state what, if any, evidence this "U.S. military screening team" relied on in making that determination or whether Mr. Mobbs himself conducted any independent review of this evidence. Indeed, the declaration's statement that Northern Alliance troops initially captured Hamdi suggests that even the U.S. military does not have any first-hand knowledge of Hamdi's conduct or status in Afghanistan.

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[4] The panel twice details the statements made in the Mobbs declaration, *Hamdi*, 316 F.3d at 461 and 472, and the Executive forcefully contends that the declaration meets the "some evidence" standard, but the panel carefully refrains from so holding. *Id.* at 474.

In sum, the record provides no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant. Accordingly, a court has no basis upon which to perform its constitutional duty "'to examine'" the "'validity'" of the "'reason'" for Hamdi's "'commitment.'" *See Ex parte Merryman*, 17 F. Cas. 144, 150 (No. 9,847) (C.C. Md. 1861) (noting "'the absolute necessity of expressing upon every commitment the reason for which it is made, [and] that the court, upon a habeas corpus, may examine into its validity'" (quoting 3 Blackstone, Commentaries 133, 134)). Thus, although the panel steadfastly maintains that it engages in a "meaningful judicial review," *see Hamdi*, 316 F.3d at 462, 473, its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review.[5]

At the same time, I hasten to note that the total inadequacy of the Executive's proffer and the panel's

[5] Moreover, while I applaud the panel's attempt to confine its holding to the facts at hand, without effect on the rights of citizens captured on American territory, *see Hamdi*, 316 F.3d at 465, similar attempts to constrain judicial holdings have proved unavailing. As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in *Hirabayashi v. United States*, 320 U.S. 81 (1943), to the specific facts of that case, *see id.* at 101-02, 105, the Court later determined that *Hirabayashi* dictated the holding in *Korematsu v. United States*, 323 U.S. 214, 218 (1944). *See id.* at 247 (Jackson, J., dissenting) ("The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding."). I fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, even one captured on American soil, who the Executive designates an "enemy combatant," as long as the Executive asserts that the area in which the citizen was detained was an "active combat zone," and the detainee, deprived of access to courts and counsel, cannot dispute this fact.

review here does not provide license for a searching judicial inquiry into the factual circumstances of every detainee's capture, or require compliance with a production order as demanding as that called for by the district court.[6] Such an approach could hamper the Executive's ability to wage war, as the panel explains at length. *See Hamdi*, 316 F.3d at 469-473. But the possibility, no matter how real, that an improperly conducted judicial inquiry could impair the Executive's ability to wage war cannot, as the panel seems to believe, provide a justification for holding that the Executive can indefinitely detain an American citizen (even one captured in a zone of active hostilities) without producing any credible evidence that the citizen is an "enemy combatant." The Constitution gives Congress, not the Executive and not the courts, the power to suspend the writ of habeas corpus when the public safety requires it. U.S. Const. art. I, § 9. Absent a suspension of the writ, the Constitution demands that we strike the proper balance between ensuring the Executive's ability to wage war effectively *and* protecting the individual rights guaranteed to all American citizens. *See Yamashita*, 327 U.S. at 8. Without such a balance, our system of ordered liberty will indeed ring hollow.

Thus, in contrast to the panel's holding, which effectively transforms the asserted "fact" of being captured in a

[6] Although I agree with the panel that the district court's production order required too much, the experienced district judge should be commended nonetheless. For, during wartime and in the face of opposition by representatives of a President enjoying record popular support, the district judge has courageously attempted to provide the meaningful judicial review that the Constitution mandates, however unpopular the case.

zone of active hostilities into an *irrebuttable* presumption of "enemy combatant" status,[7] a court could regard such a "fact" as creating a *rebuttable* presumption, thereby shifting the burden to Hamdi (and others like him) to establish that he was *not* an "enemy combatant." The burden of persuasion would then be on Hamdi, with the aid of counsel, to proffer affirmative evidence of his "non-combatant" status. This would seem to be the course dictated by precedent.

Alternatively, if the Executive produced the "relevant records and reports" on which Mr. Mobbs relied in making his declaration, a court might be able to assure itself of the legitimacy of the Executive's designation. (Of course, the possibility that the "relevant records" pertaining to Hamdi's detention might contain *no evidence* that he was an "enemy combatant" is precisely the reason why judicial review is necessary.) The Department of Defense has obviously already compiled and collected these records. Producing them for judicial review, *ex parte* and *in camera* if necessary, would not in any way hamper the Executive's

[7] Notwithstanding Judge Traxler's contention, nineteenth and early twentieth century takings cases do not support the panel's *de facto* creation of this irrebuttable presumption to justify Hamdi's indefinite imprisonment. *Cf. ante* at 32. Those cases, upholding the wartime destruction or seizure without compensation of *property* outside the United States, including property owned by U.S. citizens, do broadly note that "[i]n war, all residents of [an] enemy country are enemies." *Lamar v. Browne*, 92 U.S. 187, 194 (1875). But *no liberty* rights of U.S. citizens were at issue in any of those cases or their progeny. *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 305-306 (1909); *Lamar*, 92 U.S. at 194. Indeed, the Supreme Court has never held that an American citizen becomes an "enemy" and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.

ability to wage war. Indeed, the Executive has apparently already made similar productions in other cases. *See Padilla v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). Such evidence might suffice to substantiate the Executive's designation.[8]

But in all events, the Executive must offer more than hearsay to support that designation; and so in answer to the question certified to us – "[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yasser Esam Hamdi's classification as an enemy combatant?" – the answer must be, "No."

III.

In conclusion, I must note that I have no doubt that, in this time of great challenge for our Nation, the Executive has acted in good faith when designating Hamdi an enemy combatant. Under our Constitution, however, it is the responsibility of the courts to ensure that American citizens are not deprived of liberty without due process of law, regardless of the personal belief of any individual judge concerning the integrity of the Executive. As the

[8] In *Padilla*, now certified for interlocutory appeal to the Second Circuit, the district court ruled that it would apply the "some evidence" standard suggested by the Executive, once Padilla – with the assistance of counsel – "presents any facts he may wish to present to the court" regarding his designation as an enemy combatant. *Padilla*, 233 F. Supp. 2d at 608, 610; *Padilla v. Rumsfeld*, 2003 WL 1858157 (S.D.N.Y. April 9, 2003) (granting government's motion to certify orders in case for interlocutory appeal).

Framers well understood, the Executive branch must be subjected to checks on its power if individual liberties are to be preserved. *See Duncan*, 327 U.S. at 322-23; *see also United States v. Robel*, 389 U.S. 258, 264 (1967).

But one need not refer back to the time of the Framers to understand that courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu*, a case in which the Supreme Court sanctioned the military internment of thousands of American citizens of Japanese ancestry during World War II. *See* 323 U.S. at 219. In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the Executive's conviction of Korematsu for simply remaining in his home, in violation of the military internment order. *See id.* at 215-16.

Of course, history has long since rejected the *Korematsu* holding. Indeed, Congress itself has specifically repudiated *Korematsu*, recognizing that "a grave injustice was done to" those "of Japanese ancestry by th[e] actions . . . carried out without adequate security reasons and . . . motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 App. U.S.C.A. § 1989a(a) (West 1990). But in truth, here, as in *Korematsu*, the Executive has failed to proffer any real evidence to justify its action. When presented with no basis for reviewing the Executive's designation that an American citizen is an enemy combatant, other than the assurance of a Defense Department "advisor" that someone in the United States military made this determination, a court must demand more. *Cf. Korematsu*, 323 U.S. at 245

(Jackson, J., dissenting) ("So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination.").

The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and "more subtle blow to liberty." *Id.* at 245-46 (Jackson, J., dissenting). For although the incommunicado imprisonment of Hamdi will hopefully terminate some day, the panel opinion rationalizing this imprisonment will live on. As Justice Jackson warned, when the Executive "overstep[s] the bounds of constitutionality, . . . it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Id.* at 246.

Courts have no higher duty than protection of the individual freedoms guaranteed by our Constitution. This is especially true in time of war, when our carefully crafted system of checks and balances must accommodate the vital needs of national security while guarding the liberties the Constitution promises all citizens. *See id.* at 234 (Murphy, J., dissenting) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."). I believe that our court has failed in this case to carry out this most important responsibility. I would require a greater showing from the Executive before I would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer.

It is for all of these reasons that I respectfully dissent from the court's denial of rehearing *en banc*.[9]

[9] Contrary to Judge Wilkinson's suggestion in his concurrence, I do not question that Articles I and II delegate decisions as to the conduct of war and national defense to the Executive and Legislative branches of our government, and that we owe deference to those decisions. But deference to the political branches does not compel the Judiciary to abdicate its own duty to protect the individual liberties guaranteed all citizens. My disagreement with the panel decision is that Hamdi has not received the meaningful judicial review to which the panel acknowledges he is entitled. Such review is possible only if the Executive is required to substantiate its contentions that Hamdi is an enemy combatant with more than a declaration that the panel concedes is hearsay, inconsistent and incomplete. Even in the darkest days of World War II, after the devastating attack on Pearl Harbor, the Supreme Court recognized a greater role for the courts in safeguarding individual liberties than the panel now provides Hamdi. *See, e.g.*, *Quirin*, 317 U.S. at 46. After all, "[i]mplicit in the term 'national defense' is the notion of defending those values and ideals which set the Nation apart." *Robel*, 389 U.S. at 264. I regret that in the name of deference to the political branches' preeminence in matters of war, the panel permits the subversion of the very liberties that make defense of this Country worthwhile.

(ORDER LIST: 540 U.S.)

FRIDAY, JANUARY 9, 2004

* * *

CERTIORARI GRANTED

* * *

03-6696 HAMDI, YASER E. ET AL. V. RUMSFELD, SEC. OF DEFENSE

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

* * *

(14)

No. 03-6696

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender
FRANCES H. PRATT
Research and Writing Attorney

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

GEREMY C. KAMENS
Assistant Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Constitution permits Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an "enemy combatant"?

II. Whether the indefinite detention of an American citizen seized abroad but held in the United States solely on the assertion of Executive officials that he is an "enemy combatant" is permissible under applicable congressional statutes and treaty provisions?

III. Whether the separation of powers doctrine precludes a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification for its indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant"?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, J.A. 415-55,[1] is reported at 316 F.3d 450 (4th Cir. 2003). The opinion of the United States District Court for the Eastern District of Virginia, J.A. 282-99, is reported at 243 F. Supp. 2d 527 (E.D. Va. 2002). The denial of the petition for rehearing, J.A. 458-533, is reported at 337 F.3d 335 (4th Cir. 2003). Earlier opinions in this proceeding are reported at 296 F.3d 278 (4th Cir. 2002), J.A. 332-44, and at 294 F.3d 598 (4th Cir. 2002).

JURISDICTION

The district court had jurisdiction over this civil habeas corpus proceeding pursuant to 28 U.S.C. § 2241. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b). That court denied a timely petition for rehearing on July 9, 2003. J.A. 459. Petitioners filed their petition for certiorari on October 1, 2003, which this Court granted on January 9, 2004. J.A. 534, 124 S. Ct. 981. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 8, Clause 10 of Article I of the Constitution provides that Congress possesses the power "[t]o

[1] "J.A." refers to the joint appendix filed with this brief.

define and punish . . . Offenses against the Law of Nations."

2. Section 8, Clause 11 of Article I grants Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

3. Section 9, Clause 2 of Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

4. Section 2, Clause 1 of Article II provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."

5. The Fifth Amendment to the Constitution provides: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

6. 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

7. 28 U.S.C. § 2241 extends the writ of habeas corpus to prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States."

8. 28 U.S.C. § 2243 authorizes habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material facts," and provides that courts "shall summarily hear and determine the facts."

9. 28 U.S.C. § 2248 provides that "allegations of a return . . . if not traversed, shall be accepted as true except to the extent that the judge finds . . . they are not true."

10. The Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001), authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

11. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

STATEMENT OF THE CASE

The United States military seized an American citizen, Yaser Esam Hamdi, almost two and a half years ago. For much of that time, it has detained him essentially incommunicado at Navy prisons in Virginia and South Carolina.[2] Hamdi is not a member of the U.S. military, has not been charged with a crime, and his detention is

[2] Hamdi has been forbidden any contact with fellow prisoners and the outside world, with the exception of a visit by a representative of the International Red Cross and the infrequent exchange of censored letters with his family. On February 3, 2004, Hamdi was allowed to meet counsel for the first time. Restrictions imposed by the military on the conditions under which this meeting was permitted did not allow confidential communications.

pursuant to no provision of the U.S. Code. While this matter was pending in the lower courts, Hamdi was not permitted access to counsel, has never appeared at any hearing related to his imprisonment, and was not permitted to submit his version of the events leading up to his seizure.[3]

A. Factual Background

Hamdi is an American citizen by birth. J.A. 110-11. His father, acting as "next friend," alleged in a petition for writ of habeas corpus that his son was seized by the government abroad and subsequently unlawfully detained in a Navy brig in Norfolk, Virginia. J.A. 102-08. The lower courts appointed the Federal Public Defender ("FPD") to represent Hamdi. J.A. 113-16.

The court of appeals held that facts contained in a nine-paragraph declaration by a government official, Michael Mobbs, J.A. 148-50 ("Mobbs declaration"), must serve as the exclusive factual basis for judicial review of the detention. The declaration is based entirely on third-hand hearsay. J.A. 148 ¶ 2.[4]

[3] From his seizure through completion of litigation below, Hamdi was denied the ability to review the petition or any other materials related to this case.

[4] Information that Hamdi "affiliated" with the Taliban, for example, originated with an unknown person in the Northern Alliance, who communicated it to someone in the U.S. military, who put it in a military record, which was then reviewed by Mobbs. *See* J.A. 442, 316 F.3d at 471.

Mobbs alleges that in July or August 2001, Hamdi traveled to Afghanistan where he became "affiliated" with a Taliban unit. *Id.* ¶ 3. Mobbs asserts that on an unspecified date in late 2001, Hamdi's unit surrendered to Northern Alliance forces. J.A. 149 ¶ 4. "[C]lose inspection of the declaration reveals that Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban." J.A. 295, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 534 (E.D. Va. 2002). Indeed, Mobbs makes no explicit claim that Hamdi was seized in Afghanistan, that he was ever engaged in any fighting, or that he was seized in a "zone of active combat." Moreover, Mobbs makes no claim that Hamdi was a member of al Qaeda or that he planned, authorized, committed, or aided the terrorist attacks which occurred on September 11, 2001, or that he harbored any person or organization that did.

Mobbs does state that Hamdi was transported, without saying whether he was a prisoner at that time, with the Taliban unit from Konduz, Afghanistan, to a Northern Alliance prison in Mazar-e-Sharif, Afghanistan. Although Hamdi was apparently allowed to keep his weapon at the beginning of the journey, Mobbs says he was subsequently directed en route to surrender it and that he did so. After a prison uprising at Mazar-e-Sharif, in which Mobbs does not allege Hamdi was involved, the Northern Alliance transferred Hamdi to its prison at Sherberghan, Afghanistan. J.A. 149 ¶ 4.

While at Sherberghan, Hamdi was interviewed by a U.S. interrogation team. *Id.* ¶ 5. Mobbs does not state whether Sherberghan was then within a "zone of active combat." Mobbs says Hamdi identified himself to the team "as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to

train with and, if necessary, fight for the Taliban." *Id.* Mobbs' paraphrase of Hamdi's statement permits the inference that Hamdi "was not fighting for the Taliban when he was surrendered to the Northern Alliance forces." J.A. 296, 243 F. Supp. 2d at 534. Nevertheless, Mobbs says that "[b]ased upon [Hamdi's] interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant." J.A. 149 ¶ 6.

Mobbs avers that on an unspecified date in Sherberghan, a U.S. military screening team determined that Hamdi met the criteria for transfer to U.S. custody. *Id.* ¶ 7. Mobbs describes neither the screening process nor the criteria. However, based on the screening team's determination, Hamdi was moved from Northern Alliance control at Sherberghan to "the U.S. *short-term* detention facility in Kandahar." *Id.* (emphasis added).

According to Mobbs, it was then determined that Hamdi met unspecified and undisclosed criteria set by the Secretary of Defense for transfer to Guantanamo Bay, Cuba. *Id.* ¶ 8. Mobbs states that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* ¶ 9.

Although not set forth in the Mobbs declaration, after Hamdi was moved with other detainees to Guantanamo Bay, Hamdi alone was singled out and moved to Norfolk, Virginia. Following the Fourth Circuit's dismissal of Hamdi's petition, Hamdi was moved to a Navy brig located in Charleston, South Carolina, where he remains a prisoner held indefinitely in solitary confinement.

No competent military tribunal has ever been convened to determine Hamdi's status as a detainee as

required by U.S. regulations. *See* J.A. 288 n.2, 243 F. Supp. 2d at 531 n.2. The Mobbs declaration does not explain why Hamdi is detained in a prison. Nor does it allege that Hamdi committed any violation of the law of war.

B. Proceedings Below

On May 10, 2002, the FPD signed and filed a habeas petition pursuant to 28 U.S.C. § 2241 for Hamdi to challenge his detention. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) (*Hamdi I*).[5] The district court then ordered Respondents to grant the FPD access to Hamdi.[6] Respondents appealed the access order. *Id.* at 602. On June 26, 2002, the court of appeals held that the FPD could not file a petition on Hamdi's behalf because he had never met him, and remanded the case for dismissal. *Id.* at 603-07.

Meanwhile, on June 11, 2002, a separate habeas petition on Hamdi's behalf was filed by his father. *Id.* at 600 n.1. The new petition was consolidated with the prior case. J.A. 113-16. Having already ordered access to counsel after a full hearing prior to consolidation, the district court again ordered Respondents to allow access. *Id.*

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[5] The FPD initially believed that Hamdi was brought to the United States for prosecution. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[6] First, a federal magistrate ordered Respondents to grant counsel's access request. J.A. 46-47. On appeal to the district judge, and after another hearing on the access issue, J.A. 48-96, the district judge likewise ordered immediate access to Hamdi. J.A. 97-101.

Respondents again appealed and obtained a stay of the access order. *See* J.A. 10-11. The Fourth Circuit again reversed, finding that the district court ordered access "without adequately considering [its] implications . . . and before allowing the United States even to respond [to the newly filed petition]." J.A. 333, *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002) (*Hamdi II*). The court also advised the district court to proceed cautiously in its inquiry into the propriety of Hamdi's detention. J.A. 343, 296 F.3d at 284. Then, in a separate order lifting its previously-entered stay and directing immediate issuance of its mandate in *Hamdi II*, the Fourth Circuit instructed the district court that it must first consider the sufficiency of the Mobbs declaration as "an independent matter" before considering any other questions in the case. J.A. 352-53.

On August 13, 2002, the district court conducted a hearing to determine solely whether the Mobbs declaration "standing alone" provided a sufficient factual basis for purposes of meaningful judicial review, J.A. 191, 287,[7] and ruled on August 16 that it did not. J.A. 298, 243 F. Supp. 2d at 535. Respondents obtained certification of that order, which also directed the government to produce documentary information, and the Fourth Circuit authorized interlocutory review. *See* J.A. 18.

[7] At the hearing, the district court offered to allow Respondents to conduct a proceeding to determine Hamdi's status as a detainee in accordance with applicable military regulations. *See* Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) ("AR 190-8"). Respondents rejected this invitation. J.A. 263-65.

On January 8, 2003, the Fourth Circuit again reversed. It held that the Mobbs declaration provided a sufficient basis for concluding that Hamdi was properly detained pursuant to the war power entrusted to the Executive by the Constitution, that Hamdi could not contest the factual basis for his detention because separation of powers principles prohibited a federal court from looking behind Mobbs' formal statements, and that Hamdi's petition therefore should be dismissed without further proceedings. J.A. 415-55, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*). Hamdi sought rehearing and rehearing en banc. By a vote of eight to four, and over dissenting opinions of Judges Luttig and Motz, the court denied rehearing. *See* J.A. 458-533, *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (*Hamdi IV*).

On October 1, 2003, Hamdi filed his Petition for a Writ of Certiorari. On January 9, 2004, this Court accepted for review the three questions presented in Hamdi's petition.

SUMMARY OF ARGUMENT

"Executive power to detain an individual is the hallmark of the totalitarian state." *United States v. Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (Stevens, J., dissenting). The Fourth Circuit's opinion uncaged that power by (1) denying Hamdi the protection of the Great Writ and refusing him a meaningful hearing to challenge his detention; (2) recognizing a nonexistent executive power to indefinitely detain citizens; and (3) implying authority to detain citizens that Congress has not granted.

Hamdi's habeas petition challenges his indefinite detention – not his initial seizure by the Northern Alliance or transfer to U.S. custody. Almost two years have elapsed since the petition was filed, and during that time Hamdi has been held not as a prisoner of war but in solitary confinement, indefinitely detained in the United States without charge, conviction, or a factual hearing of any kind. Although this is a case about process and executive power, not conditions of confinement, Hamdi's conditions of confinement amount to punishment, and therefore bear on the process due.

The detention of any citizen may not be imposed without affording a meaningful and timely hearing. Moreover, punishment is prohibited in the absence of criminal proceedings. In addition, both the Geneva Convention and U.S. military regulations require that individuals held as combatants and not afforded prisoner of war status must be given a hearing. When Hamdi's habeas petition was filed in the district court, no such hearings had taken place. To this day, Hamdi has never been allowed to present a claim of innocence, respond to the allegations against him, or attend a hearing of any kind. The Fourth Circuit's opinion discarded these basic protections against the arbitrary deprivation of liberty.

Notwithstanding the absence of any judicial process supporting Hamdi's detention, the Fourth Circuit rejected statutory procedures, set forth at 28 U.S.C. §§ 2241, 2243, 2246, and 2248, meant to fulfill the promise of habeas review. According to the Fourth Circuit, Hamdi simply had no right to traverse the allegations advanced against him or to adduce facts of his own to challenge his detention. As if this were not enough, the Fourth Circuit also held that Article III courts have no authority to assess the accuracy

of the government's factual basis for the detention of a citizen as long as the government submits facts that suggest a valid exercise of the Executive's war power.

To distinguish Hamdi's case from the petitioner in *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027), a case involving a U.S. citizen seized by the military in New York City, the Fourth Circuit found it "crucial" to its decision that it was "undisputed that Hamdi was captured in a zone of active combat operations in a foreign country." J.A. 443, 448, 316 F.3d at 471, 473. The Fourth Circuit therefore sought to limit the scope of its ruling by seizing upon a fact – the location of Hamdi's initial seizure – found nowhere in the Mobbs declaration. The Fourth Circuit found this fact to be "undisputed" even though Hamdi was held incommunicado throughout the proceedings below. The location of Hamdi's seizure thus could not fairly be characterized as "conceded in fact, nor susceptible to concession in law, because Hamdi ha[d] not been permitted to speak for himself or even through counsel as to those circumstances." J.A. 494, *Hamdi IV*, 337 F.3d at 357 (Luttig, J., dissenting from denial of reh'g).

Under the Fourth Circuit's decision, Hamdi was not entitled to challenge the factual basis for his detention because such proceedings would interfere with the Executive's war power. Hamdi was denied the most basic constitutional protections against the arbitrary deprivation of liberty, according to the Fourth Circuit, because to do otherwise would require the court "to wade further into the conduct of war than [it] consider[ed] appropriate." J.A. 447, 316 F.3d at 473. It thereby radically misconstrued the separation of powers doctrine to effect the concentration,

rather than separation, of government power in a single branch.

Judicial review of executive detention is demanded by, not contrary to, the separation of powers. Indeed, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

Moreover, the Fourth Circuit recognized and deferred to a non-existent unilateral executive power to indefinitely detain citizens. The Executive admittedly has plenary power in areas of actual fighting, and may detain citizens seized in those areas temporarily without specific statutory authority or judicial review. But this authority extends only as far as required by military necessity. Once the citizen is removed from areas of actual fighting, the Executive cannot detain the citizen indefinitely without statutory authorization. Congress has enacted criminal statutes, in fact, designed to provide precisely this authority – but these statutes have not been invoked here.

Ex parte Quirin, 317 U.S. 1 (1942), provides no precedent for unilateral executive detention of citizens. The military authority at issue in *Quirin* that the Court permitted to be exercised over a citizen was explicitly authorized by Congress. No such congressional authorization exists here. Further, *Quirin* pre-dates 18 U.S.C. § 4001(a), a statute which specifically prohibits executive detention of citizens without congressional authorization. Nor does the law of war discussed in *Quirin* independently authorize the detention of citizens. The Executive's power is derived not from international law but from the Congress and the Constitution. *Brown v. United States*, 12

U.S. (8 Cranch) 110, 126 (1814). The authority to indefinitely detain Hamdi is sanctioned by neither.

Congress alone has the power to define and punish offenses against the law of nations and to define criminal conduct. Only Congress has the power to suspend the Great Writ. And historically it is Congress that has authorized the detention of both enemy aliens and citizens in the United States. Accordingly, only Congress can authorize the prolonged detention of citizens, as 18 U.S.C. § 4001(a) makes clear.

No statute, including the post-September 11 authorization for the use of force and an appropriations provision cited by the Fourth Circuit, specifically endows the Executive with the unilateral power to indefinitely detain citizens. Without such clear and unmistakable statutory authorization, no authority to indefinitely detain citizens may be implied. *Ex parte Endo*, 323 U.S. 283, 300 (1944).

Because the Executive has no power to make law, has no inherent authority outside the battlefield to indefinitely detain U.S. citizens, and because Congress has specifically prohibited such executive detentions without statutory authority, Hamdi's current detention is illegal. The indefinite detention of Hamdi, quite simply, is predicated on impermissible executive lawmaking.

By deferring to the Executive's "enemy combatant" determination as the basis for the indefinite detention of a citizen, the court of appeals violated the separation of powers it says it was trying to uphold. The result is that Article III courts are impotent to review the unilateral executive detention of citizens in the name of the war

power. This is a dangerous precedent that must be reversed.

ARGUMENT

I. HAMDI CANNOT BE IMPRISONED FOR TWO YEARS WITHOUT MEANINGFUL REVIEW BY HABEAS CORPUS, A HEARING, OR ACCESS TO COUNSEL

A. The Fourth Circuit Denied Hamdi Meaningful Habeas Review

The Executive has detained Hamdi as an "enemy combatant" for well over two years, much of that time in solitary confinement at military prisons in the United States. While no one disputes that "Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention," J.A. 443, 316 F.3d at 471, the proceeding permitted by the Fourth Circuit is a habeas proceeding in name only. The Fourth Circuit's decision effectively stripped Hamdi of this entitlement by denying him any meaningful opportunity to challenge the basis for his detention.

The Suspension Clause ensures that the Executive cannot discard the judicial process and imprison citizens at its pleasure. *See Ex parte Merryman*, 17 F. Cas. 144, 152-53 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.); *cf. In re Yamashita*, 327 U.S. 1, 9 (1946). Well-acquainted with the danger posed by the government's power to effect detention, the Founders enshrined the suspension power in Article I and limited its exercise to cases of rebellion or invasion. U.S. Const. art. I, § 9.

Habeas corpus remains the most basic protection against unbridled detention by the Executive. According to the congressional scheme, courts are required to "hear and determine the facts" related to a petitioner's detention, and petitioners are allowed to "deny any of the facts set forth in the return or allege any other material facts." 28 U.S.C. §§ 2243, 2246. Furthermore, 28 U.S.C. § 2248 provides that even if the government's factual allegations are not challenged, district courts may reject them if they "find[] from the evidence that they are not true."

Not one of these statutory provisions was honored by the Fourth Circuit. Indeed, the Fourth Circuit limited the factual record in this case to the Mobbs declaration and rejected the district court's effort to obtain more information. J.A. 439-47, 316 F.3d at 470-71. Furthermore, Hamdi was held "not entitled to challenge the facts presented in the Mobbs declaration." J.A. 452, 316 F.3d at 476. Finally, the Fourth Circuit ruled that federal courts may not engage in "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant." J.A. 449, 316 F.3d at 474.

Not surprisingly, Hamdi's petition for habeas corpus was denied. J.A. 455, 316 F.3d at 477. The Fourth Circuit did violence to the scheme established by Congress to effect habeas review and should be reversed.

B. The Due Process Clause Guarantees a Meaningful Hearing and Access to Counsel to Any Citizen Detained Indefinitely

1. Hamdi Was Entitled to, But Denied, a Meaningful Hearing

Hamdi's detention is offensive to the most basic and unimpeachable rule of due process: that no citizen may be

incarcerated at the will of the Executive without recourse to a timely proceeding before an independent tribunal to determine whether the Executive's asserted justifications for the detention have a basis in fact and a warrant in law. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Demore v. Kim*, 123 U.S. 1708, 1732-33 (2003) (Souter, J., dissenting in part); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972); *Shaughnessy v. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting).

Under the Fourth Circuit's ruling, the Executive's indefinite detention of a citizen under the war power need not be predicated on any judicial process whatsoever. In addition, as contemplated by the Fourth Circuit's ruling, any habeas proceeding to challenge this extra-judicial detention begins and ends with the submission of an affidavit based on third-hand hearsay that may not be questioned. Even in the context of the seizure of property, the submission of a one-sided affidavit in support of a seizure fails to satisfy due process. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 73-74, 82-83 (1972). The Fourth Circuit's holding that nothing more was required to support the indefinite incarceration of a citizen is untenable.

At bottom, the Due Process Clause embraces a requirement of fundamental fairness. *See In re Oliver*, 333 U.S. 257, 273-78 (1948); *see also Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). A habeas proceeding that allows Respondents not only to define the entire factual record but also to hold Petitioner incommunicado so that he cannot participate is no proceeding at all.

The Fourth Circuit held that ordinary habeas procedures were not required on the ground that Hamdi is being held pursuant to "well-established laws and customs of war." J.A. 450, 316 F.3d at 475. Nonetheless, the Fourth Circuit refused to consider whether Respondents have actually complied with those laws in detaining Hamdi.

The government has acknowledged, and the conditions of confinement confirm, that Hamdi is not being held as an ordinary prisoner of war.[8] On the contrary, his prolonged indefinite solitary confinement amounts to punishment as a criminal serving an indeterminate sentence without a trial or due process. Before detaining him as anything but a prisoner of war, however, Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and United States military regulations designed to implement the GPW, require that Hamdi's status be "determined by a competent tribunal" if any doubt arises whether he is entitled to prisoner of war status. *See* AR 190-8, § 1-6(a).[9] At a minimum, such a

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[8] Prisoners of war generally cannot be held in correctional facilities, AR 190-8, § 3-2(b), separated from their fellow soldiers, *id.* § 3-4(b), quartered under conditions less favorable than U.S. troops, *id.* § 3-4(e), or restricted from receiving mail, *id.* § 3-5(a).

[9] Even if Hamdi was fighting on behalf of the Taliban, a fact suggested but never stated by the Mobbs declaration, an emerging consensus of scholarship establishes that he should be entitled to treatment as a prisoner of war. *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 897-98 (2002); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127, 143-50 (2003); Manooher Mofidi and Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 87-88 (2002); Jordan J. Paust, *War and Enemy Status After 9/11:*

(Continued on following page)

hearing would have permitted Hamdi to assert that he was not a combatant at all. *See id.* § 1-6(e)(10)(c).

The Fourth Circuit held that the GPW was unenforceable because it evinces no intent to provide a right of action and therefore is not self-executing. J.A. 436-38, 316 F.3d at 468-69. The habeas statute itself, however, authorizes review of detention in violation of treaties. 28 U.S.C. § 2241(c)(3). No other implementing legislation is necessary in order for a habeas petitioner to claim that his detention violates the GPW.

As for the military regulations designed to implement the GPW, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974) (discussing federal regulation appointing special prosecutor); *accord Billings v. Truesdell*, 321 U.S. 542, 551 (1944) (War Department regulation regarding induction of soldiers); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942) (military regulation regarding post exchanges). Hamdi's indefinite detention without a hearing therefore is inconsistent with the Constitution, international law, and military regulations designed to implement international law.

Attacks on the Laws of War, 28 Yale J. Int'l L. 325, 333-34 (2003); Evan Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander*, 2003 Army Law. 18, 21-26 (2003). *But see* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int'l L. 328, 335 (2002).

2. Hamdi Was Entitled to, But Denied, Access to the Courts and to Counsel

The Fourth Circuit also fundamentally erred by denying Hamdi the opportunity to participate in the underlying habeas proceeding and by disposing of the case without allowing Hamdi to meet his counsel. Without these rights, Hamdi had no meaningful opportunity to challenge his detention.

The idea that citizens have a right to consult with an attorney in connection with the assertion of their legal rights breaks no new ground. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Moreover, a person held incommunicado and denied the opportunity to meet with a lawyer plainly has not been given the right to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In the context of a habeas proceeding, the significance of these elementary principles is greatly magnified. This Court has repeatedly maintained that the Due Process Clause prohibits the government from impairing habeas petitioners' ability to challenge the legality of their incarceration. *See Ex parte Hull*, 312 U.S. 546, 549 (1941); *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Denying Hamdi the ability to respond to the asserted basis for his detention is flatly incompatible with a meaningful opportunity to be heard. *Cf. Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring).

Similarly, the Fourth Circuit's refusal to allow Hamdi to have access to counsel is inconsistent with this Court's decisions ensuring the right to court access. *See Procunier v. Martinez*, 416 U.S. 396, 419, 421-22 (1974), *overruled on*

other grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989); *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977); *Ex parte Hull*, 312 U.S. at 549. Indeed, Hamdi's "right to pursue a remedy through the writ would be meaningless if he had to do so alone." *Padilla v. Rumsfeld*, 352 F.3d 695, 732 (2d Cir. 2003) (Wesley, J., dissenting in part), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027).

C. Indefinite Imprisonment in Solitary Confinement of a Citizen Alleged to Be an "Enemy Combatant" Violates Substantive Due Process

"[T]he Due Process Clause [also] contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). This component of due process prohibits detention "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, . . . or, in certain special and 'narrow' non-punitive 'circumstances.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). Intrinsic to the lawfulness of punishment, in other words, is the principle that it may not be imposed outside of criminal proceedings. *International Union, UMW of Am. v. Bagwell*, 512 U.S. 821, 826 (1994); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

Hamdi's indefinite incarceration in solitary confinement, to be sure, constitutes a criminal punishment, *see In re Medley*, 134 U.S. 160, 168-71 (1890), and apparently has been imposed because Respondents allege, but have not charged, that Hamdi has engaged in criminal conduct. *Cf.*

U.S. Const. art. III, § 3 (authorizing Congress to punish treasonous conduct); 18 U.S.C. § 2381; 50 U.S.C. § 1705(b); *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002). Even if no further procedures were required to establish Hamdi's status as an "unlawful combatant," the extra-judicial indefinite incommunicado imprisonment of a citizen is contrary to basic values underlying American society. Because his detention is punitive, it cannot be imposed by executive fiat. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-70 (1963).

II. THE FOURTH CIRCUIT MISAPPLIED THE SEPARATION OF POWERS DOCTRINE TO FRUSTRATE JUDICIAL REVIEW AND A STATUTORY PROHIBITION ON THE UNILATERAL INDEFINITE DETENTION OF CITIZENS BY THE EXECUTIVE

Driven by its interpretation of the separation of powers, the Fourth Circuit refused to permit "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant." J.A. 449, 316 F.3d at 474. It thereby limited the power of Article III courts to review the factual basis for any wartime detention of a citizen by the Executive. This is a dangerous misconstruction of the division of powers among the branches of our government. Under its ruling, the Fourth Circuit ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely, thereby allowing the separation of powers doctrine to be used as a means to concentrate, not separate, power in a single branch.

It was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), an insight that finds repeated expression in the United States Reports.[10] Use of separation of powers doctrine to justify the indefinite deprivation of a citizen's liberty upon the essentially unilateral and unreviewable determination of the Executive stands that principle on its head.

According to the court of appeals, any citizen designated by the Executive as an "enemy combatant" and seized in a "zone of active combat" may be detained indefinitely without a charge that the citizen violated any act of Congress as long as "the factual assertions set forth by the government would, *if accurate*, provide a legally valid basis for [that citizen's] detention under [the war] power." J.A. 444, 316 F.3d at 472 (emphasis added). Although noting that factual circumstances submitted by the Executive may support the detention of citizens only "if accurate," the Fourth Circuit, in a quintessential Catch-22, also held that "[the citizen] is not entitled to challenge the facts presented," J.A. 452, 316 F.3d at 476, and that Article

[10] *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Clinton v. Jones*, 520 U.S. 681, 699-700 (1997); *Loving v. United States*, 517 U.S. 748, 756-57 (1996); *INS v. Chadha*, 462 U.S. 919, 949, 951-59 (1983); *United States v. Brown*, 381 U.S. 437, 442-43 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14, 629 (1952) (Frankfurter, J., & Douglas, J., concurring); *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 91 (1947); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878).

III courts likewise may not assess their accuracy, J.A. 449, 316 F.3d at 474-75. The Executive therefore has the first and final word as to whether the military may detain an American citizen. *Cf.* J.A. 340-41, 296 F.3d at 283.

The danger posed by the collection of power in one branch was of paramount importance to the Founders. *See, e.g., The Federalist No. 47*, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."). The constitutional protections against this danger therefore were specifically designed to withstand the opposing momentum caused by war and national crises. As this Court has recognized, "[t]hey knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866); *accord Youngstown*, 343 U.S. at 650 (Jackson, J., concurring) ("They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."). The Fourth Circuit's decision authorizes the accumulation of an awesome power of government, the power to indefinitely deprive a citizen of his liberty, in a single branch. That is precisely what the separation of powers was designed to prevent.

A. The Separation of Powers Doctrine, the Suspension Clause, and Precedent Require Meaningful Judicial Review

1. Judicial Review Is Essential to the Separation of Powers

Constitutional protections against illegitimate executive detention would mean little without the opportunity to secure judicial review of the basis upon which the Executive claims the power to detain. The Great Writ, in fact, was designed to guarantee precisely this type of review. *See Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); *see also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in part and concurring in judgment) ("A doctrine that allowed transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention.").

The Fourth Circuit's refusal to permit "any inquiry," J.A. 448, 316 F.3d at 473, into the factual circumstances related to Hamdi's indefinite detention is flatly contrary to this historic function and effectively eviscerates habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless" executive detention. *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). The lower court's ruling, in fact, guarantees a judicial rubber-stamp rather than an independent check on the Executive's power to engage in unauthorized detentions, a result plainly at odds with the separation of powers. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 145-47 (1871).

Moreover, the Suspension Clause prevents the drastic limitation of judicial review required by the Fourth Circuit. Only Congress has the power to suspend judicial review of detention, and even then only in the event of rebellion or invasion. U.S. Const. art. 1, § 9, cl. 2. Independently of statutes designed to implement habeas review, the Suspension Clause preserves the right to habeas review, at the very least, as it existed in 1789 under the common law. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1267 (1970).

And under that common law, the review of executive detentions was far greater than that allowed by the Fourth Circuit in this case. Executive detentions are characterized by the absence of prior judicial process, and in particular the absence of a trial by which a jury has assessed the detainee's guilt or innocence. *Cf. Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting that jury trial serves to protect against arbitrary government detention). Consequently, judicial review of the return in a habeas proceeding under the common law was least deferential in the context of executive detentions. *See* Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 271 (Da Capo Press ed. 1972) (1876) (noting that in cases of noncriminal imprisonment, the exceptions to the general rule against controverting the return were "governed by a principle sufficiently comprehensive to include most . . . cases"); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2526 (1998) (stating that "at common law executive detentions . . . triggered a broad scope of review on habeas").

Without muscular judicial review of executive detention, the Great Writ cannot fulfill its historic common law role as a "bulwark" against the threat of arbitrary government. *See The Federalist No. 84* (Alexander Hamilton). The Fourth Circuit's ruling not only failed to acknowledge that habeas review is an essential part of the separation of powers, but it also effectively eliminated meaningful judicial review of executive detention in violation of the Suspension Clause.

2. The Fourth Circuit's Refusal to Permit Review of the Basis for Hamdi's Detention Is Without Precedent

The Fourth Circuit concluded that "any inquiry" in the circumstances of Hamdi's detention "must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch." J.A. 448, 316 F.3d at 473. But other than the decision below, no court has refused to engage in a factual inquiry in a citizen's habeas proceeding on the ground that such an inquiry would unconstitutionally encroach on the Executive's authority. In fact, the case law is entirely to the contrary.

The separation of powers doctrine did not, for example, preclude this Court from rejecting the government's argument that a habeas petitioner was a prisoner of war in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). Similarly, in *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 396-97 (Pa. Ct. C.P. 1788), the court addressed and rejected the plaintiff's claim that "the proceeding against him was as an enemy, and not as a traitor."

The Fourth Circuit was also concerned that the "logistical effort to acquire evidence from far away battle

zones . . . would profoundly unsettle the constitutional balance." J.A. 442, 316 F.3d at 471. But this Court has not hesitated to review the factual circumstances related to a military seizure overseas during wartime, including the government's claim that a citizen had a "design" to trade with the enemy. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133 (1851). The location of a seizure, in other words, has absolutely nothing to do with a court's ability to exercise judicial review. As this Court has noted without geographic reservation, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U.S. 378, 400 (1932); *see also United States v. Lee*, 106 U.S. 196, 219-21 (1882).

Judicial authority to review the propriety of military seizures overseas during wartime has been repeatedly illustrated, in particular, in cases involving the law of prize. *See The Dashing Wave*, 72 U.S. (5 Wall.) 170 (1866); *The Springbok*, 72 U.S. (5 Wall.) 1 (1866); *United States v. Guillem*, 52 U.S. (11 How.) 47 (1850); *see also* C. John Colombos, *A Treatise on the Law of Prize* 49-107 (1926). Likewise, in the aftermath of the Civil War, courts regularly reviewed the entitlement of claimants under the Captured and Abandoned Property Act to recover compensation for property seized by the military in "zones of armed combat." *See, e.g., Briggs v. United States*, 143 U.S. 346 (1892); *Lamar v. Brown*, 92 U.S. 187, 194-95 (1875); *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1864). In sum, the separation of powers has never before precluded federal courts from reviewing the propriety of military seizures, even if overseas.

B. The Executive Has No Power to Authorize the Indefinite Detention of Citizens

The court of appeals found that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the [Mobbs] declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." J.A. 417-18, 316 F.3d at 459. The Fourth Circuit's conclusion rests on at least two mistaken premises: (1) the Commander-in-Chief Clause empowers the President to detain citizens indefinitely; and (2) this Court's opinion in *Ex parte Quirin*, 317 U.S. 1 (1942), establishes the President's authority to detain "enemy combatants" under the law of war.[11] These premises are inconsistent with both the Constitution and precedent.

1. The Commander-in-Chief Clause Does Not Permit the Indefinite Detention of Citizens Outside of Areas of Actual Fighting

The Constitution gives the Executive no inherent power to detain citizens indefinitely during war or peace.

[11] A third mistaken premise is that it is "undisputed" that Hamdi was seized in a "zone of active combat," when Hamdi was denied any voice in the entire proceeding, *see* J.A. 494, 337 F.3d at 357 (Luttig, J., dissenting from denial of reh'g), and Mobbs, the only person who did have a voice, never explicitly alleged that Hamdi was seized in such a location. This gap in the factual record on an issue evidently "crucial" to the Fourth Circuit's opinion, J.A. 443, 316 F.3d at 471, is the consequence of the denial of meaningful judicial review.

While the Commander-in-Chief Clause necessarily entails plenary executive authority in areas of actual fighting, the power over citizens incident to this authority is only temporary. The Executive enjoys the authority to detain citizens seized in areas of actual fighting without specific statutory authority or judicial review for only a limited period of time as required by military necessity. Once the citizen is removed from the area of actual fighting, the Constitution requires statutory authorization to hold that citizen indefinitely.

Article II, Section 2, Clause 1 of the Constitution invests the President with the commander-in-chief power. This "power [is] purely military." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). It involves the power to deploy and direct the movement of troops in the field. *Id.*; *accord The Federalist No. 69*, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (commander-in-chief power "amount[s] to nothing more than the supreme command and direction of the military and naval forces"). The President's power as Commander in Chief "is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

On the contrary, war powers outside of the command of the military and the conduct of military operations are entrusted to Congress. Congress is invested with the authority "not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war . . . [including] all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces

and the conduct of campaigns." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

To be sure, military commanders in areas of actual fighting have plenary authority in those areas. *See United States v. Diekelman*, 92 U.S. 520, 526 (1875) ("Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed."). Accordingly, "in the place where actual military operations are being conducted, the ordinary rights of citizens must yield to paramount military necessity." *Duncan v. Kahanamoku*, 327 U.S. 304, 344 n.3 (1946) (Burton, J., dissenting). But Hamdi's habeas petition challenges his indefinite detention as an "enemy combatant" outside of areas of actual fighting, not the Executive's authority to initially apprehend him overseas.

Outside of the area of actual fighting, the Court often has had occasion to reject assertions of military authority over citizens. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955). Indeed, the scope of military authority permitted over citizens has been narrowly cabined to allow evacuation from an area in the face of an imminent invasion, jurisdiction incident to temporary military government, jurisdiction over members of the armed forces, and jurisdiction to conduct timely, congressionally authorized military prosecutions of citizens charged with violating the laws of war. *See Duncan*, 327 U.S. at 313-14; *see also Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942).

Apart from these exceptions to civil jurisdiction, the Court has confined military authority over citizens solely to areas of actual fighting. In *Ex parte Milligan*, after

acknowledging that occasions may arise in which "martial rule can be properly applied" to permit military rule over citizens, the Court explained that military authority to impose martial rule is "confined to the locality of actual war." 71 U.S. (4 Wall.) at 127. Similarly, in *Reid v. Covert*, Justice Black noted that "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront." 354 U.S. 1, 33 (1957) (plurality opinion). As in *Milligan*, however, Justice Black made clear that "[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists." *Id.* at 35; *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of civilian citizen accompanying military abroad). In sum, the principle that "the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires," is established under our system of government as "an unbending rule of law." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875).

Lower courts, likewise, have rejected efforts by the Executive to assert authority over citizens in places where no war exists.[12] Indeed, during the War of 1812, Chancellor

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[12] *See Ex parte Orozco*, 201 F. 106, 112 (W.D. Tex. 1912) (finding that "arrest upon the mere order of the President" by the military in time of peace is unlawful); *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487) ("I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power."); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C. D. Va. 1833) (No. 11,558) (Marshall, Circuit Justice) (granting habeas relief to petitioner held in custody by an executive official and stating that executive

(Continued on following page)

Kent rejected military detention of a citizen in the United States even though the military accused him of providing aid to the British within enemy territory. In *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813), petitioner Samuel Stacy, Jr., was seized by the military and imprisoned in the United States because he purportedly aided British troops "within the territory of the King of Great Britain." *Id.* at 329 (reporter's notes). Nonetheless, "[i]f ever a case called for the most prompt interposition of the court to enforce obedience to its process," Chancellor Kent wrote, "this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the State." *Id.* at 334. The fact that Stacy purportedly assisted the British in enemy territory was irrelevant to the ruling.

The reason that courts scrupulously police efforts by the military to exert its authority over citizens, in contrast to enemy aliens, is because the status of citizenship has undeniable significance under the Constitution. *See*

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officials "cannot act on other persons, or on other subjects, than those marked out in the power [granted by statute], nor can they proceed in a manner different from that it prescribes"); *Smith v. Shaw*, 12 Johns. 257, 266 (N.Y. Sup. Ct. 1815) ("If the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority."); *In re Stacy*, 10 Johns. 328, 334 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (ordering issuance of attachment to enforce obedience to writ of habeas corpus issued in favor of citizen held in military camp as an alleged spy). Even in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), where the court found, prior to the enactment of 18 U.S.C. § 4001(a), that international law permitted detention of citizens as prisoners of war, the petitioner was afforded a hearing and access to counsel.

Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). Even Respondents apparently recognized this distinction when they singled out Hamdi for transfer from Guantanamo to Norfolk. As this Court has stated, "the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). For this reason, a unilateral authority of the Executive branch to indefinitely detain American citizens has far greater implications for the character of our government than does the detention of enemy aliens.

The Court therefore has taken pains to distinguish between citizens and enemy aliens in the context of the war powers. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court concluded that non-resident enemy aliens convicted by a military commission under the auspices of the Joint Chiefs of Staff of the United States for violations of the laws of war were lawfully detained by the military overseas. 339 U.S. at 766, 790. "Executive power over enemy aliens," the Court found, "has been deemed, throughout our history, essential to war-time security." *Id.* at 774.

Citizens, on the other hand, were carefully distinguished from the enemy alien petitioners. *Id.* at 769. In other words, the rights of citizens stand in a much stronger position with respect to our military, federal courts, and the Constitution, than do those of alleged

enemy aliens.[13] This distinction is practical as well – only two U.S. citizens, Hamdi and John Walker Lindh, have been seized as "enemy combatants" in relation to the conflict in Afghanistan. Because "the problem is, relatively, extremely small," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 185 n.42 (1963), the strict limitation on unilateral executive authority over citizens does not threaten to hinder the Executive's effective prosecution of armed conflict.

The Fourth Circuit found no reason to distinguish between the military's authority to detain citizens in an area of combat and those detained in the United States, reasoning that courts are ill-positioned to review such decisions regardless of the location of detention. J.A. 452, 316 F.3d at 475-76. Expanding the scope of military authority over citizens based solely on the location of their initial seizure, however, may result in the indefinite and unreviewable detention of innocent Americans such as journalists or humanitarian workers. "Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding." *United States v. Diekelman*, 92 U.S. 520, 527 (1875); *see also* J.A. 446, 316 F.3d at 473 ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake."). Consequently,

[13] The Executive's authority to prosecute in military tribunals those aliens who are "actual enemies, active in the hostile service of an enemy power," *Eisentrager*, 339 U.S. at 778, says nothing about the nature of the protections that must be afforded to those aliens held by the United States who are not of the same character and have received no process at all. *Cf. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (U.S. Nov. 10, 2003) (No. 03-343).

the military's decision under exigent circumstances overseas to seize an American citizen is an extraordinarily illegitimate predicate for the indefinite detention of that citizen in the United States.

Furthermore, the scope of the "zone of active combat" that defines the range of the executive power over citizens was committed by the Fourth Circuit to the discretion of the Executive branch. *See* J.A. 427, 316 F.3d at 464; *see also* J.A. 525, 337 F.3d at 372 (Motz, J., dissenting from denial of reh'g) ("[U]nder the panel's holding, any American citizen . . . could be imprisoned indefinitely without being charged . . . if the Executive asserted that the area was a zone of active combat."). Because the Executive can exercise its extraordinary power to detain American citizens anywhere it says it can, the location of Hamdi's seizure permits merely "superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant." J.A. 507, 337 F.3d at 364 (Luttig, J., dissenting from denial of reh'g); *cf. Padilla v. Rumsfeld*, 352 F.3d 695, 698-99 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027).

Like the temporary seizure of the nation's steel mills, the indefinite detention of citizens by the Executive "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Hamdi is far from any location approximating a battlefield, and courthouses remain open near where he is imprisoned in South Carolina. His continued detention by the military therefore is indistinguishable from the "gross usurpation of power" rejected by this Court in *Ex parte Milligan*. *See*

71 U.S. (4 Wall.) 2, 127 (1866); *see also id.* at 141 (Chase, C.J., concurring).

2. *Ex Parte Quirin* Does Not Eliminate the Distinction Between Citizens and Non-Citizens With Respect to Indefinite Detention by the Military Without Charge

The Fourth Circuit relied upon *Ex parte Quirin*, 317 U.S. 1 (1942), to conclude that citizens are treated no differently than anyone else alleged to "take[] up arms against the United States in a foreign theater of war." J.A. 451, 316 F.3d at 475. The court of appeals not only misconstrued the Court's language in *Quirin*, it also ignored plainly applicable statutory language requiring congressional authorization for the detention of citizens.

The petitioners in *Quirin*, including at least one who claimed American citizenship, had been dispatched by the German government to secretly enter the United States to engage in sabotage operations during the Second World War. 317 U.S. at 21. With respect to the petitioner who alleged citizenship, Herbert Hans Haupt, the Court remarked that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.* at 37. Accordingly, the Court found that Haupt was entitled to no greater protection from a military trial for violations of the law of war than that afforded to the other petitioners. *Id.*

Nothing in *Quirin*'s dictum, however, permits the indefinite detention of citizens without trial and without statutory authority. Congress had not only explicitly

authorized the tribunals in *Quirin*, *id.* at 28, but the Court declined to address the President's power without this authorization, *id.* at 29. *Quirin* therefore cannot support the unilateral exercise of power by the Executive over citizens. *See Padilla*, 352 F.3d at 716.

Furthermore, *Quirin* involved the jurisdiction of military tribunals. The power to detain indefinitely without charge – particularly in the context of a war against terrorism that will never end – is different in kind from the power to subject citizens to a military tribunal for a violation of the law of war. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). A tribunal implies at least some protection for the innocent,[14] and a tangible and codified basis for the imposition of a punishment certain; unreviewable indefinite detention on the word of the Executive branch does not. The power to detain Hamdi without charges, in sum, is a much broader and more dangerous power than that at issue before this Court in *Quirin*.

Finally, *Quirin*'s dictum must be considered in light of the subsequent enactment of 18 U.S.C. § 4001(a), a statute that draws in unmistakable terms a limitation on the Executive's authority to detain citizens. Regardless of the scope of the Executive's unilateral authority with respect to enemy aliens, section 4001(a) eliminates any doubt as to the Executive's authority to indefinitely detain Hamdi without statutory authorization – it has none. For these reasons, *Quirin* does not support the Fourth Circuit's

[14] At the very least, the petitioners in *Quirin* were permitted to have a factual hearing and access to counsel.

holding that the Executive branch may treat American citizens and enemy aliens without distinction.

3. The Law of War[15] Does Not Authorize the Executive Branch to Detain Citizens Indefinitely

The Fourth Circuit also held that Hamdi "is being held as an enemy combatant pursuant to the well-established laws and customs of war." J.A. 450, 316 F.3d at 475. The law of war, however, cannot abrogate constitutional and statutory prohibitions against such a unilateral executive power.

Holding that the petitioners in *Quirin* were subject to military commissions, this Court noted that under international law, "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31. Because "Congress ha[d] incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war," international law was directly at issue in *Quirin*. *Id.* at 30.

[15] The "law of war" is an old term for the body of customary and treaty-based international humanitarian law that describes internationally-accepted norms related to the waging of armed conflict. *See* William Winthrop, *Military Law and Precedents* 42 (reprint 2d ed. 1920).

The Fourth Circuit wrongly presumed that the authority to capture and detain combatants under the law of war amounts to a unilateral executive power to exercise military authority over citizens alleged to be combatants. Chief Justice Marshall rejected this argument in *Brown v. United States*, holding that "in executing the laws of war," the Executive could not "seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation." 12 U.S. (8 Cranch) 110, 128, 129 (1814). The law of war does not independently provide the authority for government action without legislation. *Id.*; *accord Conrad v. Waples*, 96 U.S. 279, 285 (1877) ("[Congress] might, undoubtedly, have provided for the confiscation of the entire property, from its being within the enemy's country; but the legislature did not so enact."). In other words, the law of war is not an independent description of executive power. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring) ("[T]he fact that power exists in the Government does not vest it in the President."). The Court's analysis in *Brown* applies with equal force to the indefinite detention of Hamdi.

Unlike at the time that this Court decided *Brown*, however, a statute explicitly confirms that the Executive branch cannot independently authorize the indefinite detention of a citizen. 18 U.S.C. § 4001(a) unambiguously "proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981). To the extent that this statute conflicts with long-in-the-tooth customs of war, the thirty-three year old statute states the law. *See Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (noting that the Court would be "bound by the law of nations" until Congress passed a contrary enactment).

The Fourth Circuit employed the law of war to sweep aside constitutional and statutory arguments against the unilateral executive detention of citizens. It is well-settled, however, that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263-64 (1967). Because the Executive's power "must stem either from an act of Congress or from the Constitution itself," *Youngstown*, 343 U.S. at 585, and the authority to indefinitely detain Hamdi is derived from neither source, his detention is illegal.

The fact that the Executive does not have the power to detain citizens indefinitely without congressional authorization does not leave our nation helpless in the circumstances presented in this case. The only other case that has arisen involving a citizen allegedly found on the opposite side of hostilities in Afghanistan is almost factually indistinguishable from this one. And Congress has already provided the statutory authority that the Executive used successfully to prosecute the other case. *See United States v. Lindh*, 227 F. Supp. 2d 565, 567-69 (E.D. Va. 2002).

C. Congress Possesses the Exclusive Power to Authorize Any Detention of a Citizen That Is More Than Temporary, But Has Not Done So Here

1. The Power to Authorize the Prolonged Detention of Citizens Rests Solely With Congress

A unilateral executive power to indefinitely detain citizens has the potential to jeopardize our democratic

system. The structure and text of the Constitution, legislation dating back to the founding of this country, legal precedent, and the plain language of 18 U.S.C. § 4001(a) all demonstrate that the authority to permit the prolonged detention of citizens is entirely entrusted to Congress.

First, the provision of the Constitution that addresses detention without judicial review, the power to suspend the writ of habeas corpus, is contained in Article I. U.S. Const. art. I, § 9, cl. 2. In one of the only overt references to individual rights in the main text of the Constitution, the Suspension Clause ensures judicial review of executive detention unless the Legislature suspends the Great Writ. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487). If the Executive branch possessed an equivalent power by which it could circumvent judicial review of detention on its own authority, the promise of the Suspension Clause would be forsaken.

Second, Congress is assigned the responsibility to define and punish offenses against the law of nations. U.S. Const. art. I, sec. 8, cl. 10; *see Ex parte Quirin*, 317 U.S. 1, 27 (1942). Likewise, it is Congress that must define criminal conduct. *See Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). The assignment of these powers to Congress demonstrates that the legislature, not the Executive, is peculiarly entrusted to specify prohibited conduct upon which a citizen may be subjected to indefinite detention. In other words, if the liberty protected by the Due Process Clause "is to be regulated, it must be pursuant to the law-making functions of the Congress." *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

Third, outside of the context of criminal proceedings, Congress has been responsible for authorizing the detention of both enemy aliens and citizens in the United States. In this country's infancy, Congress passed the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (now codified at 50 U.S.C. § 21), which authorizes the President to detain and deport enemy aliens found in the United States following a declaration of war. Moreover, in 1812, Congress enacted an "Act for the safe keeping and accommodation of prisoners of war," which permitted the President to arrange for "the safe keeping, support, and exchange of prisoners of war." Act of July 6, 1812, ch. 128, 2 Stat. 777 (repealed 1817). These statutes "afford[] a strong implication that [the President] did not possess those powers by virtue of [a] declaration of war," and that the detention of enemy aliens and prisoners of war in the United States requires statutory authorization. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814).

Similarly, during the Cold War, Congress enacted the Emergency Detention Act of 1950, Pub. L. No. 81-831, Title II, 64 Stat. 1019 (1950) (formerly codified at 50 U.S.C. §§ 811-826 (repealed)), which allowed the President during war or insurrection to detain people suspected of espionage or sabotage. Like the Alien Enemy Act of 1798 and the Safe Keeping and Accommodation of Prisoners of War Act of 1812, the Emergency Detention Act would have been unnecessary if the Constitution independently granted the President broad war powers to indefinitely detain citizens suspected of acting on behalf of our enemies.

Fourth, this Court on several occasions has indicated that congressional authorization is required for non-criminal detentions as well. In *Brown v. United States*,

Chief Justice Marshall, writing for the Court, made clear that in the United States, the government can neither detain prisoners of war nor confiscate enemy property in the absence of congressional legislation. 12 U.S. (8 Cranch) at 126-29. This Court also has rejected the claim that the Executive possesses inherent power to authorize detention pending extradition. In *Valentine v. United States*, the Court stated that "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." 299 U.S. 5, 9 (1936); *see also United States v. Moreland*, 258 U.S. 433, 443 (1922) (Brandeis, J., dissenting) (noting that "imprisonment . . . imposed under an executive order . . . was clearly void under the Constitution, whatever its character or incidents, its duration or the place of confinement").

Fifth, Congress has made it unmistakably clear that all detentions of citizens by the federal government must be pursuant to an act of Congress. "No citizen," Congress has stated, "shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). By the enactment of section 4001(a) in 1971, Congress eliminated whatever doubt may have existed before that time that the Executive possessed independent authority to indefinitely detain U.S. citizens. In the absence of congressional authorization for the indefinite detention of Hamdi, his continued detention is illegal.

2. Congress Has Not Authorized Hamdi's Indefinite Detention

In addition to holding that 18 U.S.C. § 4001(a) was not "intended to overrule the longstanding rule" that an American citizen may be indefinitely detained as an "enemy combatant," J.A. 436, 316 F.3d at 468, the Fourth Circuit held in the alternative that the extraordinary detention of Hamdi was authorized by two congressional acts: a joint resolution known as the Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), and an appropriations provision set forth at 10 U.S.C. § 956(5). Neither of these acts authorize the indefinite detention of citizens.

a. The Authorization for the Use of Military Force Does Not Authorize Hamdi's Indefinite Detention

Passed only one week after the September 11, 2001 terrorist attacks, the AUMF grants the President the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a). The concise terms of the joint resolution say little else except that it constitutes "specific statutory authorization" as required by the War Powers Resolution. *Id.* § 2(b).

By its terms, therefore, the AUMF constitutes no greater authorization of power to the President than if Congress had issued a declaration of war. And a "declaration of war has only the effect of placing . . . two nations in a state of hostility, of producing a state of war, of giving

those rights which war confers; but not of operating, by its own force, any of those results such as a transfer of property, which are usually produced by ulterior measures of government." *Brown*, 12 U.S. (8 Cranch) at 125-26. Indeed, the power to detain prisoners of war in the United States is not granted simply "by virtue of the declaration of war." *Id.*; *cf. Caldwell v. Parker*, 252 U.S. 376, 385 (1920) (declaration of war did not make soldiers exclusively subject to prosecution by court-martial).

Moreover, the text and history of section 4001(a) weigh against a finding that the AUMF permits the indefinite detention of citizens. Section 4001(a) prohibits detention "of *any kind* absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981). By virtue of this statute, Congress specifically addressed the precise authority at issue and required that citizens not be imprisoned or otherwise detained by the United States "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The statute was enacted partly in response to the detention of Japanese-Americans in the United States during the Second World War. *See* H.R. Rep. No. 116, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1436. Construing section 4001(a) to allow the Executive to detain citizens based solely on a declaration of war runs directly counter to this basis for its enactment.

Under these circumstances, no authorization to detain citizens can be implied from the AUMF. "It is one thing to draw an intention of Congress from general language . . . where Congress has not addressed itself to a specific situation," Justice Frankfurter noted in *Youngstown*, but "[i]t is quite impossible . . . when Congress did specifically address itself to a problem, as Congress did to that of

seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

More specifically, this Court made clear in *Ex parte Endo* that statutory authorization for the detention of citizens requires that it be done in clear and unmistakable language:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

323 U.S. 283, 300 (1944).[16]

[16] In fact, this Court's jurisprudence reveals a healthy skepticism applied to statutes cited to support congressional authorization of the exercise of military control over citizens. *See Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress did not intend to supplant the civilian court system when it authorized martial law in territory of Hawaii); *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (holding that a military order annulling a judicial order was unauthorized by Congress and therefore void); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 135 (1866) (Chase, C.J., concurring) (concluding that Congress had not authorized Milligan's seizure).

The AUMF, of course, does not "use the language of detention." *Id.* Nor does it mention citizens, much less section 4001(a). Given its attention to invocation of the War Powers Resolution, "[i]t is unlikely – indeed inconceivable – that Congress would . . . at the same time[] leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act [18 U.S.C. § 4001(a)]." *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027). Because the AUMF does not specifically authorize the detention of citizens, it cannot represent a congressional sanction for Hamdi's detention.

b. 10 U.S.C. § 956(5) Does Not Authorize Hamdi's Indefinite Detention

10 U.S.C. § 956(5) provides that department of defense "[f]unds . . . may be used for . . . expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons . . . whose status is determined . . . to be similar to prisoners of war, and persons detained . . . pursuant to Presidential proclamation." This run-of-the-mill statute does not authorize the indefinite detention of citizens.

As an initial matter, the statutory language says nothing about citizens, much less the authority to detain, and therefore is far from the specific authorization required by section 4001(a). On the contrary, the statute simply permits the use of funds for expenses related to the maintenance of prisoners of war, other detainees, and those detained by Presidential proclamation. Just as the statute does not purport to authorize the President to

detain people by proclamation, it does not constitute authorization for detention of any other kind.

In *Ex parte Endo*, this Court explained that authority for the detention of citizens cannot be construed from just such a general appropriation. 323 U.S. at 303 n.24; *see also Greene v. McElroy*, 360 U.S. 474, 505 n.30 (1959). In the absence of language that "plainly show[s] a purpose to bestow [that] precise authority," an appropriations provision does not constitute authority for the Executive to detain citizens. *Endo*, 323 U.S. at 303 n.24.

In contrast to an area of law "where the Government's freedom to act is clear," extra-judicial detention of citizens requires specific authorization because "explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene*, 360 U.S. at 507. Section 956(5) plainly does not grant to the Executive "the precise authority which is claimed," *Ex parte Endo*, 323 U.S. at 303 n.24, and therefore does not authorize Hamdi's detention. In sum, neither the AUMF nor 10 U.S.C. § 956 authorize the Executive to indefinitely detain citizens as "enemy combatants."

3. The Indefinite Detention of Hamdi Constitutes Impermissible Lawmaking by the Executive Branch

In this case, the Fourth Circuit's extraordinary deference to the Executive effectively approved secret lawmaking incident to the creation of undisclosed criteria for determining which citizens the Executive will detain indefinitely. The Mobbs declaration indicates that the Executive determined that any citizen "associated" with

the former government of Afghanistan may be designated an "enemy combatant." The Executive also established undisclosed criteria to determine whether a citizen so designated would be subject to indefinite detention. By these acts, the Executive endeavored to make its own secret law.

This Court has rebuffed attempts by the Executive to encroach upon the law-making function of the Congress. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (striking down as impermissible lawmaking an Executive Order directing the Secretary of Commerce to take possession of and operate steel mills). The power to make laws was entrusted by "[t]he Founders of this Nation . . . to the Congress alone in both good and bad times." *Id.* at 589. On this point, the Court has observed, "the Constitution is neither silent nor equivocal." *Id.* at 587.

Not only is the separation of powers principle discussed above essential to prevent the accumulation of power by a single branch of government, it is necessary as well to "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Indeed, "[i]t is this concern of encroachment and aggrandizement that has animated [this Court's] separation-of-powers jurisprudence and aroused [the Court's] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)); *see also Clinton v. City of New York*, 524 U.S. 417, 482 (1998); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272-73 (1991); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986); *Bowsher v. Synar*, 478

U.S. 714, 727 (1986). The "[very] safety of our institutions," this Court has noted, "depends in no small degree on a strict observance of this salutary rule." *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878).

Although "the powers of the three branches are not always neatly defined," *Clinton v. Jones*, 520 U.S. 681, 701 (1997), the power to authorize the indefinite detention of citizens by the federal government is, as we have demonstrated above, firmly entrusted to Congress. The court of appeals therefore erred by recognizing an illegitimate power of the Executive to make its own law.

CONCLUSION

For the above-stated reasons, Petitioners respectfully request that this Court reverse the ruling of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender
FRANCES H. PRATT
Research and Writing Attorney

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

GEREMY C. KAMENS
Assistant Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioner

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No. 03-6696

In the Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JOHN A. DRENNAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that respondents have established the legality of the military's detention of Yaser Esam Hamdi, a presumed American citizen who was captured in Afghanistan during the combat operations in late 2001, and was determined by the military to be an enemy combatant who should be detained in connection with the ongoing hostilities in Afghanistan.

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In the Supreme Court of the United States

No. 03-6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

This next-friend habeas action challenges the authority of the Commander in Chief and the armed forces under his command to detain an individual, Yaser Esam Hamdi, who was captured by coalition forces in Afghanistan in late 2001 when he surrendered with a Taliban unit while armed with an AK-47 assault rifle. The U.S. armed forces in Afghanistan determined that Hamdi is an enemy combatant who should be detained in connection with the ongoing hostilities. The military later obtained records indicating that Hamdi, a Saudi national, was born in the United States. Hamdi is now detained at the Naval Consolidated Brig in Charleston, South Carolina. The court of appeals correctly held that respondents have demonstrated the legality of Hamdi's wartime detention, and that this habeas action should be dismissed.

STATEMENT

1. a. On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, striking the World Trade Center buildings in New York City and the headquarters of the Nation's Department of Defense at the Pentagon, and attempting but failing to strike another target in Washington presumed to be the White House or the U.S. Capitol. Approximately 3,000

people were killed, thousands more were injured, hundreds of millions of dollars of property was destroyed, and the U.S. economy was severely damaged. It was the deadliest foreign attack on American soil in one day in the Nation's history.

In response, the President, acting as Commander in Chief, took action to defend the country and to prevent additional attacks. Congress supported the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224. Congress also emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. Following major military operations, U.S. and coalition forces have removed the Taliban from power and "seriously degrad[ed]" al Qaeda's training capability. Office of the White House Press Secretary, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Mar. 20, 2004) <www.whitehouse.gov/news/releases/2004/03/20040322-3.html>. However, "[p]ockets of al Qaeda and Taliban forces remain a threat to U.S. and coalition forces and to the Afghan government and Afghan people," and U.S. and coalition forces "continue to conduct the U.S. campaign to eliminate the primary source of support to the terrorists who viciously attacked our Nation on September 11." *Ibid.* See *DCI's Worldwide Threat Briefing* at 19-20 (Mar. 9, 2004) <www.senate.gov/~armed_services/statemnt/2004/March/Tenet.pdf> (discussing continuing threat posed by al Qaeda and Taliban in Afghanistan).

An American force of approximately 11,500 soldiers and a NATO-led force of several thousand additional troops remain stationed in Afghanistan and engaged in active military operations. United States and coalition forces have just launched another major offensive. Pamela Constable, *U.S. Launches New Operation in Afghanistan*, Wash. Post, at A22 (Mar. 14, 2004). At the same time, al Qaeda and Taliban fighters continue to launch attacks on U.S. and coalition troops, foreign aid workers, and Afghan government officials; Osama bin Laden and his top deputies have called on al Qaeda and its supporters to continue their terrorist holy war, or jihad, against the United States and coalition partners; and the United States and allied nations have been subject to deadly attacks tied to al Qaeda throughout the world. See *Purported Zawahiri Tape Condemns Musharraf*, Wash. Post, at A16 (Mar. 26, 2004); *Rasul* v. *Bush*, Nos. 03-334 & 03-343, U.S. Br. 3 & nn.1-2 (03-334 & 03-343 U.S. Br.) (citing reports).

b. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. Those taken into U.S. control are subjected to a multi-step screening process to determine if their continued detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." Dep't of Defense, *Fact Sheet: Guantanamo Detainees* <www.defenselink.mil/news/Feb2004/d20040220det.pdf.> (*Guantanamo Detainees*). Individuals who are not enemy combatants are released.

Individuals who are determined to be enemy combatants are sent to a centralized facility in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews with the detainee. That

screening team looks at the circumstances of capture, assesses the threat that the individual poses and his potential intelligence value, and determines whether continued detention is warranted. Detainees whom the U.S. military determines have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, or to another facility. A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and *released* from U.S. custody. See *Guantanamo Detainees*, *supra*.

c. In late 2001, while Northern Alliance forces were engaged in battle with the Taliban near Konduz, Afghanistan, Hamdi surrendered to Northern Alliance forces—while armed—along with a Taliban unit and was taken to a prison operated by the Northern Alliance in Mazar-e-Sharif. J.A. 148-149 (Mobbs Decl. ¶¶ 3-4). Hamdi was transferred to a Northern Alliance prison in Sheberghan, where he was interviewed by a U.S. Interrogation Team. J.A. 149 (¶ 5). Based on interviews with Hamdi in Afghanistan and his association with the Taliban, the U.S. military determined that Hamdi was an enemy combatant. J.A. 149 (¶ 6).

In Afghanistan, Hamdi identified himself as a Saudi citizen who was born in the United States and who had entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. J.A. 149 (Mobbs Decl. ¶ 5). He affiliated with a Taliban unit and received weapons training, and remained with the unit following the September 11 attacks and after the U.S. and coalition forces began military operations in Afghanistan. J.A. 148 (¶ 3). Subsequent interviews with Hamdi have confirmed his status as an enemy combatant. For example, Hamdi himself has stated that he surrendered to Northern Alliance forces and turned over his Kalishnikov (*i.e.*, AK-47) assault rifle to them. J.A. 150 (¶ 9).

U.S. military authorities concluded that Hamdi met the criteria established by the Department of Defense for determining which captured enemy combatants should be placed in U.S. control. J.A. 149 (Mobbs Decl. ¶ 7). Pursuant to an order of the U.S. Land Forces Commander in Afghanistan, Hamdi was transferred from Sheberghan to a U.S. detention facility in Kandahar. *Ibid.* Following a separate military screening in January 2002, Hamdi was transferred from Kandahar to the U.S. Naval Base at Guantanamo Bay, Cuba. J.A. 150 (¶ 8). At Guantanamo, the military obtained records indicating that Hamdi, a Saudi national, was born in Baton Rouge, Louisiana, and therefore might be a United States citizen. As a result, in April 2002, the military transferred Hamdi to the U.S. Naval Brig in Norfolk, Virginia.

On July 29, 2003, Hamdi was transferred to the U.S. Naval Consolidated Brig in Charleston, South Carolina, where he is currently detained. The military has determined that the facilities in Charleston are more appropriate for the detention of enemy combatants. Three enemy combatants are detained at the Charleston Naval Brig (Hamdi, Jose Padilla, and Ali Saleh Kahlah al-Marri).[1]

2. a. On June 11, 2002, the detainee's father, Esam Fouad Hamdi, filed this next-friend habeas action on behalf of his son in the District Court for the Eastern District of Virginia.[2] The petition avers that, "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghani-

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[1] Throughout his detention, Hamdi, like the other detainees, has been treated humanely. In addition, he has been permitted limited mail privileges and has been visited by the International Committee for the Red Cross. In any event, as petitioners acknowledge (Br. 6), the habeas petition challenges only the legality of Hamdi's detention, and "not conditions of confinement."

[2] Two earlier habeas petitions were filed on behalf of Hamdi by the federal public defender and by another individual. However, the court of appeals ordered the dismissal of those petitions on the ground that neither petitioner possessed next-friend standing. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002). It is undisputed that Hamdi's father has next-friend standing.

stan." J.A. 104 (Pet. ¶ 9). The petition—which has never been amended—claims that Hamdi is "an American citizen," and that his detention without charges or counsel "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." J.A. 107 (Pet. ¶¶ 22, 23).[3] The petition seeks Hamdi's release and other relief. J.A. 108-109.

Before respondents were served with the petition, the district court appointed the federal public defender as counsel for Hamdi and ordered that he be given unmonitored access to Hamdi. J.A. 333. Respondents immediately appealed the district court's order and the court of appeals reversed that order. J.A. 332-344. The court "sanctioned a limited and deferential inquiry into Hamdi's status, noting that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." J.A. 421 (citing *Ex parte Quirin*, 317 U.S. 1, 31, 37 (1942)). The court remanded for further proceedings on that issue, admonishing that "the district court must consider the most cautious procedures first." J.A. 343.

b. On remand, respondents filed a response to, and motion to dismiss, the habeas petition. J.A. 117-150. The filing included the sworn declaration (J.A. 148-150) of the Special Advisor to the Under Secretary of Defense for Policy, Michael H. Mobbs, who has been substantially involved with issues related to the detention of enemy combatants in the current conflict. The declaration confirmed that Hamdi was seized in Afghanistan in the fall of 2001, and explained the factual basis for the military's determination to detain him as an enemy combatant. See pp. 4-5, *supra*.

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[3] Petitioners have abandoned the only other claim stated in the petition—that the President's Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (2001), "constitute[s] an unlawful suspension of the Writ." J.A. 108 (Pet. ¶ 25). In any event, that claim is without merit because, by its terms, the President's Military Order does not apply to a presumed United States citizen such as Hamdi. See J.A. 132-133.

On July 31, 2002, the district court set a hearing on the government's return for August 13, 2002, and further directed respondents to produce, prior to the hearing, "for in camera review by the Court," materials concerning: "Hamdi's legal status," including "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi"; the names and addresses of "all the interrogators who have questioned Hamdi"; "statements by members of the Northern Alliance regarding [Hamdi]"; and a list of "the date of Hamdi's capture" and "all the dates and locations of his subsequent detention." J.A. 185-187. Respondents moved for relief from that order, at least until the court had ruled on the motion to dismiss.

On August 13, 2002, the district court held a hearing on the government's return. J.A. 190-281. At the hearing, the district court repeatedly stated its intent to take the Mobbs Declaration and "pick it apart." J.A. 218; see J.A. 214, 227. The court went on to question almost every aspect of the declaration, including whether there is "anything in the Mobbs' Declaration that says Hamdi ever fired a weapon," J.A. 197, and whether Mobbs was even a United States government employee, J.A. 198; see J.A. 227. At the same time, the district court stated that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that he "had a firearm" when he surrendered. J.A. 236; see J.A. 255 ("He was there to fight. And that's correct.").

c. On August 16, 2002, the district court issued an order (J.A. 282-299) holding that respondents' return was "insufficient" to justify Hamdi's detention. J.A. 283. The court stated that "[a] thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers," J.A. 292, and that it is "necessary to obtain the additional facts requested," J.A. 299. The court ordered respondents to produce for its *ex parte*, in camera review the materials demanded by its earlier production order, together with screening criteria that respondents had previously offered (J.A. 119-120 n.1) to provide the court. J.A. 283.

3. The court of appeals, in an opinion jointly authored by all three panel members, reversed and remanded with instructions to dismiss. J.A. 415-455. The court explained that the President is authorized under the Constitution and Congress's statutory backing in the current conflict "to detain those [enemy combatants] captured in armed struggle." J.A. 425 & n.3, 435. The court further held that, as a presumed United States citizen, Hamdi is entitled to judicial review of his military detention in a habeas proceeding. J.A. 428-429. However, the court stressed that judicial "review of battlefield captures in overseas conflicts is a highly deferential one." J.A. 455; see J.A. 429-432.

Applying that understanding, the court of appeals "conclude[d] that Hamdi's petition fails as a matter of law." J.A. 439. The court held "that there is no purely legal barrier to Hamdi's detention" under the Constitution, 18 U.S.C. 4001(a), or the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. No. 972 (GPW). J.A. 439, 434-439. The court also rejected petitioners' challenge to the military's determination that Hamdi is in fact an enemy combatant, explaining that, "[w]here, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention." J.A. 452-453. Any additional fact-finding, the court held, could "profoundly unsettle the constitutional balance." J.A. 442.

4. On December 2, 2003, the Department of Defense announced that, as a matter of policy, it will permit an enemy combatant who is a presumed citizen and detained in the United States to have access to counsel after the military has determined that such access will not compromise national security and it has either completed intelligence collection from the detainee or determined that access to counsel

would not interfere with such efforts. See <www.defenselink.mil/releases/2003/nr20031202-0717.html>. The Department of Defense also announced that Hamdi would be permitted access to counsel under that policy, subject to appropriate security constraints. *Ibid.* Hamdi has met with counsel for petitioners on February 2 and March 2, 2004, at the Charleston Naval Brig. The latter visit was unmonitored.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Hamdi's wartime detention is lawful and that this next-friend habeas action therefore should be dismissed.

I. Petitioners' purely legal challenges to Hamdi's wartime detention are without merit. In our constitutional system, the responsibility for waging war is committed to the political branches. In time of war, the President, as Commander in Chief, has the authority to capture and detain enemy combatants for the duration of hostilities. That includes enemy combatants presumed to be United States citizens. *Ex parte Quirin*, 317 U.S. 1 (1942). The U.S. military took control of Hamdi and determined that he was an enemy combatant in Afghanistan while waging a military campaign launched by the President with the express statutory backing of Congress. The military's authority to hold such a captured enemy combatant in connection with ongoing hostilities is well-established.

Nothing in 18 U.S.C. 4001(a) affects the Executive's authority to detain enemy combatants in wartime. Moreover, Congress has authorized such detentions by, *inter alia*, expressly backing the President's use of "all necessary and appropriate force" in the current conflict. 115 Stat. 224. Nor is Hamdi's detention inconsistent with Article 5 of the GPW. The GPW is not self-executing and therefore does not confer any private rights that may be enforced in a habeas action. In any event, Article 5 applies only when there is "doubt" as to whether a detainee is entitled to prisoner-of-war (POW) privileges under the GPW. No such doubt exists here because the President has conclusively determined that al

Qaeda and Taliban detainees are *not* entitled to those privileges. Neither the GPW nor the military's own regulations provide for any review of the military's determination that an individual is an enemy combatant in the first place.

II. Petitioners' challenge to the military's determination that Hamdi is an enemy combatant is also without merit. An enemy combatant who is a presumed citizen and who is detained in this country is entitled to judicial review of his detention by way of habeas corpus. In such a proceeding, a habeas petitioner may raise legal challenges to the individual's detention, such as petitioners' arguments that the Commander in Chief does not have the authority to detain a captured enemy combatant who is an American citizen, or that such a detention is barred by 18 U.S.C. 4001(a). However, the scope of judicial review that is available concerning the military's determination that an individual is an enemy combatant is necessarily limited by the fundamental separation-of-powers concerns raised by a court's review or second-guessing of such a core military judgment in wartime.

Applying an appropriately deferential standard of review, the court of appeals correctly concluded that the record adequately demonstrates that Hamdi is indeed an enemy combatant. The sworn declaration accompanying the government's return explains that Hamdi surrendered with an enemy unit in a theater of combat operations while armed with an AK-47, and that he is therefore a prototypical enemy combatant. Moreover, petitioners have repeatedly acknowledged that Hamdi was in Afghanistan—an area of extensive combat operations—when he was captured. Taking account of petitioners' own admissions and arguments in determining whether the challenged exercise of executive authority is lawful is consistent with the settled rule of restraint that a court should go no further than necessary to decide a sensitive constitutional issue before it.

III. The necessarily limited scope of review that is available in a habeas proceeding in this extraordinary context is consistent both with the Constitution and federal

habeas statutes. The habeas statutes do not require a court to conduct evidentiary proceedings when, as here, a court may determine on the record before it that there is no cause for granting the writ. *Walker* v. *Johnston*, 312 U.S. 275 (1941). Nor does the Constitution guarantee captured enemy combatants an automatic or immediate right of access to counsel in a habeas proceeding such as this. A captured enemy combatant who is being detained during the conflict —and has not been charged with any crime—has no right under the law of war to meet with counsel to plot a legal strategy to secure his release. The Due Process Clause—which is interpreted in the light of that long-settled rule—does not supply any different guarantee. Moreover, granting enemy combatants an automatic right of access to counsel would interfere with the military's compelling interest in gathering intelligence to further the war effort.

The Department of Defense has adopted a policy to allow enemy combatants who are presumed United States citizens and detained in this country access to counsel once the military has determined that such access will not interfere with intelligence gathering. In light of that policy, the fact that Hamdi now enjoys access to counsel under the policy, and the canon of constitutional avoidance, the Court may wish to reserve the counsel issue for another day. If the Court reaches the issue, however, it should affirm the court of appeals' conclusion that Hamdi was not entitled to immediate access to counsel in this habeas action.

IV. Any attempt at further factual development concerning the military's enemy-combatant determination would present formidable constitutional and practical difficulties. Attempting to recreate the scene of Hamdi's capture is inconsistent with the practical reality that the troops in Afghanistan are charged with winning a war and not preparing to defend their judgments in a U.S. courtroom. In addition, any fact-finding concerning Hamdi's capture could require locating the American soldiers who interviewed Hamdi in Afghanistan, not to mention the Northern Alliance

forces to whom Hamdi surrendered. Such efforts would divert the military's attention from the ongoing conflict in Afghanistan, and it would be demoralizing for American troops to be called to account for their actions in a federal courtroom by the very enemies whom they have been ordered by the political branches to reduce to submission.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT HAMDI'S WARTIME DETENTION IS LAWFUL AND THAT THIS ACTION SHOULD BE DISMISSED

The next-friend habeas petition in this case challenges the authority of the Commander in Chief and the armed forces under his command to detain an enemy combatant who was undisputedly captured in an active combat zone in a foreign land in connection with a military campaign that is still ongoing. This case does not present the threshold jurisdictional obstacle in *Rasul* v. *Bush*, Nos. 03-334 & 03-343, because the detainee at issue is a presumed American citizen and is being held in the United States. The U.S. courts therefore have jurisdiction to consider this habeas action and, in particular, have authority to hear legal challenges to Hamdi's detention. As the court of appeals recognized, however, the nature of judicial review available with respect to the military's enemy-combatant determination is limited by the profound separation-of-powers concerns implicated by efforts to second-guess the factual basis for the exercise of the Commander in Chief's authority to detain a captured enemy combatant in wartime. Guided by those considerations, the court of appeals correctly held that the government has demonstrated the legality of Hamdi's detention.

I. PETITIONERS' LEGAL CHALLENGES TO HAMDI'S WARTIME DETENTION ARE WITHOUT MERIT

Petitioners challenge Hamdi's detention on the purely legal grounds that the Executive lacks authority to detain an enemy combatant who is a presumed United States citizen; that such a detention is barred by 18 U.S.C. 4001(a); and that

Article 5 of the GPW entitles such a detainee to a tribunal. Those arguments should be rejected.

A. The Challenged Wartime Detention Falls Squarely Within The Commander In Chief's War Powers

The Constitution vests the political branches and, in particular, the Commander in Chief, with the power necessary to "provide for the common defense," U.S. Const. preamble, including the authority to vanquish the enemy and repel foreign attack in time of war. See *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (listing the enumerated war powers). That power is fully engaged with respect to the armed conflict that the United States is now fighting against the al Qaeda terrorist network and its supporters in the mountains of Afghanistan and elsewhere; is supported by the statutory backing of Congress; and applies equally to an enemy combatant, like Hamdi, who is a presumed United States citizen.

1. Article II, § 2, Cl. 1 of the Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." As this Court observed in *Johnson* v. *Eisentrager*, 339 U.S. 763, 788 (1950), it is "of course" the case that the textual "grant of war power includes all that is necessary and proper for carrying [it] into execution." See also *Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to repel and defeat the enemy."); *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) (President has authority, *inter alia*, to "employ [the U.S. armed forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."); accord *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870); J.A. 425.[4]

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[4] The Framers appreciated the importance of giving the Executive unquestioned authority to defend against foreign attack. As Hamilton wrote in *The Federalist No. 70*, "[d]ecision, activity, secrecy, and dispatch" are characteristic of a unitary executive power and are "essential to the protection of the community against foreign attacks." Forty-five years later, Justice Story, in discussing the Commander-in-Chief Clause, reaffirmed that: "Of all the cases and concerns of government, the direction of

It is well-settled that the President's war powers include the authority to capture and detain enemy combatants in wartime, at least for the duration of a conflict. See *Quirin*, 317 U.S. at 30-31 & n.8; see also *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); 2 L. Oppenheim, *International Law* 308-309 (H. Lauterpacht ed., 5th ed. 1935); William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920); J.A. 425-426. Indeed, the practice of capturing and detaining enemy combatants in wartime not only is deeply rooted in this Nation's history, see Lt. Col. G. Lewis & Capt. J. Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945, Dep't of the Army Pamphlet No. 20-213* (1955), but as old as warfare itself, see Allan Rosas, *The Legal Status of Prisoners of War* 44-45 (1976).

In *Quirin*, the Court explained that the "universal agreement and practice" under "the law of war" holds that "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces." 317 U.S. at 30-31. "Unlawful combatants are likewise subject to capture and detention" for the duration of the conflict, "but *in addition* they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31 (emphasis added); see also *Eisentrager*, 339 U.S. at 786 ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such

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war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power." *Commentaries on the Constitution of the United States* § 767, at 546-547 (Ronald D. Rotunda & John E. Nowak eds. 1987). Although petitioners object (Br. 23) to "[t]he danger posed by the collection of power in one branch," the Constitution leaves no doubt that there is only one Commander in Chief. Petitioners' reliance on separation-of-powers cases in which there was no such singular textual constitutional commitment of power is misplaced.

forces, * * * enemy belligerents, [and] prisoners of war.'") (quoting *Kahanamoku*, 327 U.S. at 313-314). As a matter of practice, moreover, the mere detention of opposing forces as enemy combatants or prisoners of war without military punishment has been the rule, and detention and prosecution of enemy combatants for specific war crimes the exception.

The U.S. military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including more recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of POWs in the United States (some of whom were, or claimed to be, American citizens) without trial or counsel. See Lewis & Mewha, *supra*, at 244. During the Civil War, the United States detained hundreds of thousands of confederate combatants—who remained United States citizens. *Id.* at 27-28. As the court of appeals recognized, the military's settled authority to detain captured enemy combatants in wartime applies squarely to the global armed conflict in which the United States is currently engaged, in which—as the September 11 attacks demonstrate—the stakes are no less grave. J.A. 341, 427.

The detention of captured enemy combatants serves vital military objectives. First, "detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies." J.A. 430; see *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Second, detention enables the military to gather vital intelligence from captured combatants concerning the capabilities, internal operations, and intentions of the enemy. See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l Law Studies 108-109 (U.S. Naval War College 1977); J.A. 347-351 (Woolfolk Decl.). Such intelligence-gathering is especially critical in the current conflict because of the unconventional way in which the enemy operates. See Part III.B, *infra*. The detention of captured combatants during an ongoing armed conflict "'is neither a punishment nor an act of

vengeance,' but rather a 'simple war measure.'" J.A. 431 (quoting Winthrop, *supra*, at 788).[5]

Petitioners repeatedly characterize Hamdi's detention as "indefinite." But the detention of enemy combatants during World War II was just as "indefinite" while that war was being fought. It is true that, given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement, but that does not mean that Hamdi will not be released. The military has made clear that it has no intention of holding captured enemy combatants any longer than necessary in light of the interests of national security, and scores of captured enemy combatants have been released by the United States or transferred to the custody of other governments. See 03-334 & 03-343 U.S. Br. 47-49.

2. The only claim raised in the habeas petition in this case and still being pressed by petitioners is that, "as an American citizen," Hamdi's detention as an enemy combatant violates the Due Process Clause. J.A. 107 (Pet. ¶ 22); see p. 5, *supra*. The court of appeals correctly rejected that purely legal argument. J.A. 450.

The military's authority to detain enemy combatants in wartime is not diminished by a claim, or even a showing, of

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[5] Petitioners assert (Br. 20) that Hamdi's detention is "criminal punishment." But, as discussed above, the detention of enemy combatants has not "historically been regarded as a punishment" and is not designed to "promote the traditional aims of punishment." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Hamdi is being held for the classic non-punitive purposes of wartime detention, and has not been charged with any war crime or domestic offense. In that respect, Hamdi's situation is unlike that of the so-called "American Taliban" to whom petitioners compare Hamdi. See Pet. Br. 40 (arguing that John Walker Lindh's case is "indistinguishable" from Hamdi's). Unlike Hamdi, Lindh was charged with criminal offenses based on his association with the Taliban and, after pleading guilty to aiding the Taliban and using a weapon with the Taliban, Lindh was sentenced to 20 years' imprisonment. See <www.cnn.com/2002/LAW/10/04/lindh.statement>. Because Hamdi is not serving any criminal punishment, he may be released after the current hostilities end or at any point that the military determines such release is appropriate.

American citizenship. See J.A. 451-452. As this Court observed more than 50 years ago in *Quirin*, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." 317 U.S. at 37; see *Territo*, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (same), cert. denied, 352 U.S. 1014 (1957); Levie, *supra*, at 75-76. To be sure, the fact that a detained enemy combatant is a presumed American citizen may enable him to proceed with a habeas action that could not be brought by an alien held overseas (cf. *Johnson* v. *Eisentrager*, *supra*), but—as this Court squarely held in *Quirin*—it does not affect the military's settled authority under the law of war to treat him as an enemy combatant. J.A. 451-452.

Petitioners suggest that a presumed United States citizen should be relieved of the consequences of his status as an enemy combatant when it comes to *detention*, as opposed to trial and *punishment* for a war crime. See Pet. Br. 12, 36-37. That is incorrect. *Quirin* involved a challenge to the "detention and trial of petitioners." 317 U.S. at 25; *id.* at 18-19. Moreover, if, as this Court held in *Quirin*, citizenship does not relieve an enemy combatant of the most severe consequences of violating the law of war—a military commission and punishment up to death—then citizenship does not relieve an enemy combatant of the normal and less drastic consequence of capture by opposing forces, *i.e.*, detention during the conflict. *Id.* at 37-38.

The *Quirin* Court's discussion of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), reinforces the conclusion that citizens, no less than aliens, who are "part of or associate[] with the armed forces of the enemy" may be held accountable under the law of war for their status or actions as enemy belligerents. *Quirin*, 317 U.S. at 45. *Milligan* involved a citizen who was seized by the military and was convicted by a

military commission on charges that he conspired against the Union in the Civil War. 71 U.S. (4 Wall.) at 6-7. He challenged the military's authority to proceed against him, arguing that he was not a member of the U.S. armed forces and was not "within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war." *Id.* at 7. The Court found that Milligan was "in nowise connected with the military service," and held that he therefore was not subject to punishment under the law of war. *Id.* at 121-122.

The presumed American in *Quirin*, Herman Haupt, argued that the law of war did not apply to him under the rationale of *Milligan*. In rejecting that claim, the *Quirin* Court emphasized that *Milligan*'s "statement as to the inapplicability of the law of war to Milligan's case" was limited to "the facts before it." 317 U.S. at 45. In particular, the *Quirin* Court stressed, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Ibid.* Haupt, unlike Milligan, associated with the forces of the enemy and therefore was an "enemy belligerent." *Id.* at 37. As a result, the *Quirin* Court held, Haupt was fully subject to the law of war even though he was a presumed American. *Ibid.* Hamdi, who surrendered in Afghanistan with a Taliban unit while armed with an AK-47, is, like Haupt, a prototypical enemy belligerent subject to the law of war. See Part II.B, *infra*.[6]

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[6] Petitioners rely (Br. 30-31) on other cases to support their claim that no citizen may be subject to military authority outside of an active battlefield. Those cases, however, involved the military trial of *civilians* for ordinary crimes, and not the wartime detention of an *enemy combatant* like Hamdi. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (ex-serviceman charged with murder); *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality) (wife of serviceman charged with murder); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) (wife of serviceman charged with murder); *Raymond* v. *Thomas*, 91 U.S. 712 (1875); cf. *In re Stacey*, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (military commander "assum[ed] criminal jurisdiction over a private citizen").

B. Hamdi's Detention Is Bolstered By, And By No Means Contrary To, The Actions Of Congress

1. Petitioners argue (Br. 13) that "Congress alone" has the power to authorize the detention of a captured enemy combatant who is a presumed American citizen. See also Pet. Br. 29-30, 41-42. That is incorrect. Especially in the case of foreign attack, the President's authority to wage war is not dependent on "any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). The Nation was viciously attacked on September 11, 2001; the President dispatched the armed forces with orders to destroy the organizations and individuals responsible for that attack; and, as Commander in Chief, the President may employ the armed forces "in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming*, 50 U.S. (9 How.) at 615; see p. 13, *supra*. That includes the authority to engage in the time-honored and humanitarian practice of *detaining* enemy combatants captured in connection with the conflict, as opposed to subjecting such combatants to the more harmful consequences of war.

Petitioners acknowledge (Br. 12) that the Executive has "plenary power" to capture and detain enemy combatants like Hamdi "in areas of actual fighting," but argue that once a "citizen is removed from the area of actual fighting," the Executive cannot detain the citizen without "statutory authorization." See Pet. Br. 29. That argument is misguided. This Court has long recognized that the commander-in-chief power "is not limited to victories in the field and the dispersion of the insurgent forces," but "carries with it inherently the power to guard against the immediate renewal of the conflict." *Stewart*, 78 U.S. at 507; see *In re Yamashita*, 327 U.S. 1, 12 (1946). One of the most conventional and humane ways of protecting against the "immediate renewal" of fighting in connection with an ongoing conflict is to detain captured combatants so that they may not rejoin the enemy.

Moreover, the general practice of the U.S. military—and the practice called for by the GPW (art. 19, 6 U.S.T. at

3334)—is to evacuate captured enemy combatants from the battlefield and to a secure location for detention. That protects both U.S. soldiers and detainees. Once the military makes a determination that an individual is an enemy combatant who should be detained in connection with the conflict, the *place* where the combatant is detained in no way affects the legality of that determination, much less the circumstances that led to the determination in the first place.

2. In any event, Congress *has* affirmed the type of classic wartime detention at issue in this case. As explained above, immediately following the September 11 attacks, Congress not only recognized by statute that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," but explicitly backed the President's use of "all necessary and appropriate force" in connection with the current conflict. 115 Stat. 224. As the court of appeals explained, "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." J.A. 435; see 03-1027 U.S. Br. 38-44, *Rumsfeld* v. *Padilla* (discussing authorization).

Capturing and detaining enemy combatants is a quintessential and necessary aspect of the *use* of military force, not to mention a customary and necessary means of *defeating* the enemy. See *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."). American troops are still engaged in active combat against al Qaeda and Taliban fighters in Afghanistan, and have just launched a new offensive against the enemy. See p. 2, *supra*. The President's authority to use military force in Afghanistan and elsewhere in the global armed conflict against the al

Qaeda terrorist network must include the authority to detain those enemy combatants who are captured during the conflict; otherwise, such combatants could rejoin the enemy and renew their belligerency against our forces.

Accordingly, far from being at odds with Congress's actions, the classic wartime detention at issue comes with the express statutory backing of Congress. And the President's constitutional authority in these matters therefore is at its apogee. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

3. Although they did not raise the claim in their habeas petition, petitioners argue (Br. 43-48) that Hamdi's detention is barred by 18 U.S.C. 4001(a). The court of appeals properly rejected that argument. J.A. 434-436. As the government has fully explained in *Padilla* (see 03-1027 U.S. Br. 44-49), Section 4001 does not intrude on the authority of the Executive to capture and detain enemy combatants in wartime. To the contrary, Congress placed Section 4001 in Title 18 of the United States Code—which governs "Crimes and Criminal Procedure"—and addressed it to the control of civilian prisons and related detentions. Moreover, the legislative history of Section 4001(a) confirms that it was enacted to repeal the Emergency Detention Act of 1950, 50 U.S.C. 811 *et seq.* (1970), which was addressed solely to *civil* detentions. The fact that Section 4001(a) does not apply to military detentions is bolstered by subsection (b) of Section 4001, which is addressed to "control and management of Federal penal and correctional institutions," and *exempts* "military or naval institutions." 18 U.S.C. 4001(b).

In any event, as the court of appeals explained, the military detention at issue in this case is authorized by at least two different Acts of Congress, and thus would be exempt from Section 4001(a) even if it were otherwise covered. J.A. 435. First, as discussed, the challenged executive action in this case falls within Congress's statutory Authorization for Use of Military Force in the wake of the September 11

attacks. 115 Stat. 224. Second, Congress has authorized the use of appropriated funds to the Department of Defense to pay for the detention of "prisoners of war" and individuals—such as enemy combatants—"similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4).

The canon of constitutional avoidance counsels against interpreting Section 4001(a) in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime. See *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466 (1989). In *Quirin*, 317 U.S. at 37, this Court held that citizenship does not relieve an enemy combatant of the ordinary consequences of his belligerency. Congress is presumed to have been aware of *Quirin* when it enacted Section 4001(a) in 1971. Yet, as the court of appeals observed, "[t]here is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is." J.A. 436.[7]

C. Hamdi's Detention Is Consistent With Article 5 Of The GPW And The Military's Own Regulations

Although they did not raise the claim in their habeas petition, petitioners argue (Br. 17-18) that Hamdi's detention is barred by Article 5 of the GPW, 6 U.S.T. at 3322. That is

[7] Nothing in *Ex parte Endo*, 323 U.S. 283 (1944), on which petitioners rely (Br. 48), is to the contrary. In *Endo*, the government conceded that Endo "present[ed] no problem of espionage or sabotage," 323 U.S. at 302, whereas here the Executive has determined that Hamdi is an enemy combatant. More to the point, in *Endo*, this Court distinguished between "civilian" and "military" detentions and stated that, because "Endo is detained by a civilian agency," "no questions of military law are involved." *Id.* at 298. The detention of the captured battlefield combatant in this case is a classic type of military detention. To the extent that petitioners suggest (Br. 48) that *Endo* required "explicit" statutory language to authorize the Executive Branch's use of the war powers, they also are mistaken. In *Endo*, the Court stated that "[t]he fact that the [Congressional] Act and the [accompanying executive] orders are silent on detention does not of course mean that any power to detain is lacking." 323 U.S. at 301.

incorrect. To begin with, the GPW supplies no basis for granting habeas relief because it is not self-executing. J.A. 436; see *Eisentrager*, 339 U.S. at 789 n.14; 03-334 & 03-343 U.S. Br. 39 (citing authorities). Moreover, as the court of appeals explained, the fact that the habeas statute permits an individual to challenge his detention based on a violation of a treaty, 28 U.S.C. 2241, does not mean that a habeas petitioner may challenge his detention based on an alleged violation of a non-self-executing treaty like the GPW, which does not confer any privately enforceable rights. J.A. 437-438.

In any event, petitioners' Article 5 claim fails for the same reason as their claim that Hamdi's detention is inconsistent with the military's regulations concerning POWs and other detainees. Br. 17-18 (citing Army Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997) (C.A. App. 91-128)). Both Article 5 and the military's regulations call for a military tribunal only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges, and not as to each and every captured combatant. See Reg. 1-5a(2) (C.A. App. 96) ("All persons taken into custody by the U.S. forces will be provided the protections" afforded POWs "until some other *legal* status is determined *by competent authority*.") (emphases added).[8] In the case of Hamdi and the other al

[8] The commentary accompanying Article 5 states that it was added to address the concern "that decisions which might have the gravest consequences should not be left to a *single* person, who might often be of *subordinate* rank." Int'l Comm. of the Red Cross, Commentary III, *Geneva Convention Relative to the Treatment of Prisoners of War* 77 (Jean S. Pictet & Jean de Preux eds. 1960) (Commentary III) (emphases added). As discussed above, individuals, such as Hamdi, who have been taken into U.S. control in Afghanistan and ultimately designated for continued detention by the military are subjected to a detailed and multi-layered screening process. Moreover, as discussed in the text below, the President himself has made the only determination that is legally relevant for purposes of Article 5—*i.e.*, that al Qaeda and Taliban detainees are not entitled to POW privileges under the GPW. See also No. 03-334 & 03-343

Qaeda and Taliban detainees in the current conflict, there is no such doubt. The President—the highest "competent authority" on the subject—has conclusively determined that al Qaeda and Taliban detainees, including Hamdi, do not qualify for POW privileges under the GPW. J.A. 438-439.[9]

Furthermore, neither Article 5 nor the military's regulations apply to the threshold determination whether an individual is in fact subject to capture and detention. As explained, they apply only to the determination whether a captured combatant is entitled to POW privileges under the GPW, which in turn is based on whether the combatant is a lawful or unlawful combatant. As the court of appeals explained, for purposes of this habeas petition, that is "a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case." J.A. 438; see *Quirin*, 327 U.S. at 30-31.

II. UNDER ANY CONSTITUTIONALLY APPROPRIATE STANDARD, THE RECORD DEMONSTRATES THAT HAMDI IS AN ENEMY COMBATANT

Petitioners also challenge the military's determination that Hamdi is an enemy combatant. The court of appeals properly rejected that argument and held that no further factual development is warranted.

Br. for Amici Law Professors, Former Legal Advisers of the Department of State and Ambassadors et al. 20-24 (discussing Article 5 of GPW).

[9] The President's determination is based on the fact that al Qaeda and Taliban fighters systematically do not follow the law of war and therefore do not qualify as lawful combatants under Article 4 of the GPW, 6 U.S.T. at 3320, entitled to POW privileges. See Office of the White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo* (Feb. 7, 2002) <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>; Dep't of Defense, *Briefing on Detainee Operations* (Feb. 13, 2004) <www. defenselink.mil/transcripts/2004/tr20040213-0443.html>; 03-34 & 03-343 U.S. Br. 45 n.18. The determination whether captured enemy combatants are entitled to POW privileges under the GPW is a quintessential matter that the Constitution (not to mention the GPW) leaves to the political branches and, in particular, the President.

A. The Executive's Determination That An Individual Is An Enemy Combatant Is Entitled To The Utmost Deference By A Court

As this Court has observed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). The customary deference that courts afford the Executive in matters of military affairs is especially warranted in this context.

A commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority. See *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander in Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); cf. *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948); *Eisentrager*, 339 U.S. at 789. In this case, that determination was made by U.S. armed forces in Afghanistan acting under the directives of the U.S. Land Forces Commander in Afghanistan. J.A. 149. As the court of appeals explained, "[t]he designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the conduct of hostilities." J.A. 432.

Especially in the course of hostilities, the military through its operations and intelligence-gathering has an unmatched vantage point from which to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe. As the court of appeals stated, "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and "[t]he political branches are best positioned to

comprehend this global war in its full context." J.A. 341; see also *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981); J.A. 464 (Wilkinson, J., concurring in the denial of rehearing). At the same time, the Executive—unlike the courts—is politically accountable for the decisions made in prosecuting war and in defending the Nation. See *Chicago & So. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948); J.A. 426-427.

Respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict may well limit courts to the consideration of legal attacks on the detention of captured enemy combatants, such as those made by petitioners here and addressed in Part I above. This Court's precedents are consistent with that understanding. For example, in *In re Yamashita*, *supra*, this Court considered the scope of judicial review in a habeas action challenging an enemy alien's conviction and death sentence before a military commission. In rejecting that petition, the Court "emphasized" at the outset—relying on *Quirin*—"that on application for habeas corpus [in these circumstances] we are not concerned with the guilt or innocence of the [captured enemy combatants]." 327 U.S. at 8. Rather, the Court continued, "[t]he courts may inquire whether the detention complained of is *within the authority of* those detaining the petitioner," and not whether the proper military authorities "have made a wrong decision on disputed facts." *Ibid.* (emphasis added). See *Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (Judicial review of military charges "is of most limited scope"; "[w]e ask only whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged.").

A court's review of a habeas petition filed on behalf of a captured enemy combatant in wartime is of the "most limited scope," and should focus on whether the military is authorized to detain an individual that it has determined is an enemy combatant. That is, the central question for a court is whether "the detention complained of"—here, the

detention of a presumed American who the military has determined surrendered with an enemy unit in an active combat zone in a foreign land—"is within the authority of [the military]." 327 U.S. at 8. If such a classic wartime detention is authorized (and it is, for the reasons discussed above), the courts do not inquire whether the military authorities "have made a wrong decision on disputed facts." *Ibid.*

At most, however, in light of the fundamental separation-of-powers principles recognized by this Court's decisions and discussed above, a court's proper role in a habeas proceeding such as this would be to confirm that there is an adequate basis for the military's determination that an individual is an enemy combatant. In particular, the court can ensure that the Executive's articulated basis for detention is a lawful one and, for example, that the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*. The court of appeals appropriately exercised such a role in this case and thereby avoided embroiling the courts in a factual dispute about a battlefield capture halfway around the world.

B. The Record Demonstrates That Hamdi Is An Archetypal Battlefield Combatant

1. The record in this case amply supports the military's determination that Hamdi is an enemy combatant who may be detained by the military while our forces are still engaged in combat. The Mobbs Declaration (J.A. 148-150) voluntarily submitted by respondents in support of their return explains the factual basis for the military's enemy-combatant determination that Hamdi is an enemy combatant. The declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; stayed with the Taliban after the U.S. and coalition forces had launched the military campaign in Afghanistan; and surrendered with his Taliban unit to—and, indeed, laid down arms to—coalition forces. J.A. 148-149 (Mobbs Decl. ¶¶ 3-5, 9). It further explains that Hamdi's own statements confirm that he

affiliated with an enemy unit and was armed when he surrendered. J.A. 150 (¶ 9); see J.A. 445-446.[10]

An individual who surrenders while armed with an enemy unit in an active combat zone undeniably qualifies as an enemy combatant. Indeed, such a person is an archetypal battlefield combatant. Cf. *Quirin*, 317 U.S. at 38 ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation *or entered the theatre or zone of active military operations*.") (emphasis added); Oppenheim, *supra*, at 223 (Citizens of even neutral states, "if they enter the armed forces of a belligerent, or do certain other things in his favour, * * * acquire enemy character."); *id.* at 224 ("during the World War hundreds of subjects of neutral States, who were fighting in the ranks of the belligerents, were captured and retained as prisoners").

Indeed, even if Hamdi had not been armed when he surrendered, he still would qualify as an enemy combatant. It is settled under the law of war that the military's authority to detain individuals extends to non-combatants who enter the theater of battle with the enemy force, including clerks, laborers, and other "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, *supra*, at 789; see William E.S. Flory, *Prisoners of War* 35 (1942) ("The American orders of 1863 provided that persons who accompany an army may be made prisoners of war."); GPW art. 4(A)(4), 6 U.S.T. at 3320 ("[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the

[10] As Judge Luttig observed, the declaration not only was "made under penalty of perjury by the appointed representative of the government," but "the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security." J.A. 516 (dissenting from the denial of rehearing).

armed forces," may be detained); Hague Convention of 1907, art. 3, 36 Stat. 2277 ("The armed forces of the belligerent parties may consist of combatants and non combatants" who in "case of capture" may be detained as prisoners of war.); Ingrid Detter, *The Law of War* 135-136 (2d ed. 2000).

Even the district court, which stated bluntly that it was "challenging everything in the Mobbs Declaration," J.A. 227, taking it "piece by piece," J.A. 214, and trying to "pick it apart," J.A. 218, declared that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," J.A. 236, that he "had a firearm," *ibid.*, that he was "present with a Taliban unit," J.A. 229, and that "[h]e was there to fight," J.A. 255. In other words, even the district court—which microscopically reviewed the wording of the Mobbs Declaration, see Gov't C.A. Br. 33-42—recognized that the record established all that was necessary, and indeed much more, to show that Hamdi is an enemy combatant captured in connection with the ongoing hostilities in Afghanistan.

2. The record supports the military's enemy-combatant determination in another compelling respect: "it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country." J.A. 418, 448, 453; see also J.A. 461 ("Hamdi's own filings make clear that he was seized in a zone of active combat operations.") (Wilkinson, J., concurring in the denial of rehearing); J.A. 461-463 & n.2 (discussing record); J.A. 474-475 ("The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was captured there by our military.") (Traxler, J., concurring in the denial of rehearing); J.A. 473-476 (same).

The next-friend habeas petition in this case avers that Hamdi "resided in Afghanistan" when he was seized. J.A. 104 (Pet. ¶ 9). Hamdi's father, the next-friend who filed this action, reiterated that fact in a letter that petitioners placed into the record. J.A. 188-189 (Aug. 8, 2002 Letter from E. Hamdi to Sen. Leahy). Throughout this litigation, petitioners have made clear that they are not challenging

Hamdi's capture and detention in Afghanistan. J.A. 462-463 n.2 (listing representations made by petitioners' counsel). The certiorari petition itself acknowledges that Hamdi was in Afghanistan when he was captured. See Pet. 5 ("[Hamdi] resided in Afghanistan in the Fall of 2001."). And, as discussed, that fact is affirmed by the sworn declaration submitted by respondents. J.A. 148-150.

Under the law of war, an individual's residence in hostile territory in a time of war may have important legal effect. Indeed, in a traditional war between nation states, *all* inhabitants of enemy territory have been presumed to be enemies. See *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 310-311 (1870) ("It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); *Lamar* v. *Browne*, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies."); *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 308 (1909) (Those who reside in enemy territory "are adhering to the enemy so long as they remain within his territory."); *Brown* v. *Hiatts*, 82 U.S. (15 Wall.) 177, 184 (1872) ("[T]he inhabitants of the Confederate States * * * and of the loyal States * * * became * * * reciprocally enemies to each other [during the Civil War]"); J.A. 481-483 (Traxler, J., concurring in the denial of rehearing) (citing authorities).

Even in a traditional war, the fact that an individual resides in enemy territory does not mean that he necessarily is subject to capture, detention, or violence under the law of war. But at a minimum, the Commander in Chief's constitutional authority to make determinations about who is an enemy combatant is at its height when that authority is exercised with respect to individuals who are present in a combat zone in a foreign land, not to mention present with enemy forces. As Judge Traxler explained, courts are "compelled, by the nature of war and by dint of the separation of powers * * * to give deference to the Executive to determine who within a hostile country is friend and who is foe." J.A. 482 (concurring in the denial of rehearing).

The unconventional nature of the current armed conflict only makes such deference more appropriate. In a traditional war, the combatants of the belligerent nation would wear distinctive insignia and follow the laws and customs of war. See *Quirin*, 317 U.S. at 35. The enemy in the current conflict purposely blurs the lines between combatants and non-combatants by refusing to wear a uniform or distinctive insignia and attempting to blend into the civilian population. Therefore, the armed forces should be entitled, if anything, to more deference in this conflict than in a traditional conflict in determining who among those present in a theater of active combat operations qualify as enemy combatants.

Furthermore, the acknowledged fact that Hamdi was seized in Afghanistan means that attempting to conduct any evidentiary proceedings concerning the military's enemy-combatant determination would place the courts in an untenable position. Attempting to reconstruct the scene of Hamdi's capture during the battle near Konduz, Afghanistan in late 2001 would require, *inter alia*, locating and contacting American soldiers, Northern Alliance members, or other allied forces, many of whom may remain engaged in active combat overseas. As discussed in Part IV below, any such evidentiary inquiry into the Executive's conduct of an ongoing war would raise grave constitutional problems.

Petitioners' repeated assertions (see Br. 12, 29; J.A. 153, 290) that they are not challenging Hamdi's detention as an enemy combatant in Afghanistan also fundamentally limit the nature of their claims. Hamdi's status as an enemy combatant did not change when he was removed from Afghanistan. His detention there was concededly lawful, and it is no less lawful when, consistent with the intent of the Geneva Convention, he is moved from Afghanistan to a safer location. Nor does Hamdi's transfer from Afghanistan require

the military to submit any additional basis in support of his capture—which undeniably occurred *in* Afghanistan.

Taking account of petitioners' own allegations and arguments in this case in determining the scope of the appropriate judicial review also conforms with the settled rule of restraint that a court should go no further than necessary to decide an issue before it. As this Court long ago observed, "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker* v. *Los Angeles County*, 338 U.S. 327, 333 (1949); see also *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable'"). Such restraint is particularly appropriate in light of the extremely sensitive nature of the constitutional challenge here to the exercise of the Commander in Chief's wartime authority to detain enemy combatants.[11]

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[11] The court of appeals' decision to take account of petitioners' own allegations and arguments also is consistent with the fact that subject-matter jurisdiction in this case was dependent on a finding that Hamdi's father is a proper next-friend and, therefore, may bring this action "in his [son's] behalf." 28 U.S.C. 2242. The rigorous test for establishing next-friend standing, see *Whitmore* v. *Arkansas*, 495 U.S. 149, 164 (1990), reflects the need to ensure that the relationship between the next-friend and the underlying claimant is significant enough that the courts can rely on the representations made by the next friend, so that the court does not issue an advisory opinion. As the Fourth Circuit observed in dismissing the initial habeas petition filed on Hamdi's behalf, the significant-relationship requirement is "connected to a value of great constitutional moment": Article III's requirement that "a plaintiff have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 605 (4th Cir. 2002) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The significant relationship that gave the court of appeals jurisdiction to hear this next-friend habeas action required giving effect to the manner in which the next-friend—Hamdi's own father—has himself "sharpen[ed] presentation of the issues." Moreover, according to the letter that petitioners themselves filed, Hamdi's father had personal knowledge that his son was in Afghanistan. J.A. 188-189.

3. In this Court, petitioners have not contested that Hamdi was in Afghanistan, nor have they suggested that they challenge his detention in Afghanistan. Instead, they argue in a footnote (Br. 28 n.11) that the court of appeals erred in stating that it was "'undisputed' that Hamdi was seized in a 'zone of active combat.'" In other words, to this day petitioners still do not contest that Hamdi was in Afghanistan in late 2001 when he was captured; rather, they dispute only the narrower issue whether Hamdi was seized within "a zone of active combat" in Afghanistan. The Mobbs Declaration, J.A. 149 (¶ 4), the Afghanistan Combat Zone Executive Order,[12] and contemporaneous accounts of the fierce fighting in Konduz, Afghanistan in late 2001, see Dep't of Defense, *News Transcript* (Nov. 15, 2001) <www.defenselink.mil/news/Nov2001/t11152001_t1115sd.html>; *Konduz Falls to Northern Alliance* (Nov. 26, 2001) <www.cnn.com/2001/WORLD/asiapcf/central/11/26/ret.afghan.konduz/>; *Online Newshour: Military Moves* (Nov.

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[12] As a practical matter, Afghanistan—a country that thousands of U.S. armed forces had entered for the purpose, *inter alia*, of ousting the Taliban regime—was an active combat zone in late 2001. See J.A. 482 n.9 (Traxler, J., concurring in the denial of rehearing). In any event, on December 12, 2001, the President issued the Afghanistan Combat Zone Executive Order, which designated, for purposes of 26 U.S.C. 112 (combat zone pay for members of the armed forces), "Afghanistan, including the air space above, as an area in which Armed Forces of the United States are and have been engaged in conflict." The order further designated "September 19, 2001, as the date of the commencement of combatant activities in such zone." See <www.whitehouse.gov/news/releases/2001/12/20011214-8.html.>. Numerous federal laws take effect based on the President's designation of an area as a "combat zone" pursuant to 26 U.S.C. 112(c)(2). See 26 U.S.C. 112 historical notes (listing combat zone orders). The fact that *Congress* defers to the Executive's designation of an area as a combat zone would make it all the more anomalous for a *court* to second-guess that classic executive wartime determination in this case.

9, 2001) <www.pbs.org/newshour/bb/military/July-dec01/military_11-9.html>, all confirm that Hamdi was captured amidst an active combat zone. In any event, the question whether a particular area of foreign territory in which U.S. and coalition forces are heavily engaged in military operations is an active combat zone is precisely the type of issue that the Constitution leaves to the judgment of the military commanders who are fighting the war, and that is not appropriate for evidentiary proceedings or second-guessing in a federal courtroom far removed from the battlefield.

C. The Challenged Wartime Detention At Issue Is Lawful Under A "Some Evidence" Standard

The government also has justified Hamdi's detention under a "some evidence" standard. See J.A. 514-516 (Luttig, J., dissenting from the denial of rehearing en banc). The court of appeals concluded that it was "not necessary for [it] to decide whether the 'some evidence' standard is the correct one to be applied in this case," because it was persuaded for the reasons explained above that further factual development into the circumstances of Hamdi's capture was not necessary and would be inappropriate. J.A. 449. But the some evidence standard nonetheless provides an additional basis on which to affirm the court of appeals' judgment.

Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination. See *Superintendent* v. *Hill*, 472 U.S. 445, 455-457 (1985) (explaining that the "some evidence" standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion" so as to ensure that the "record is not so devoid of evidence that the findings" are "without support or otherwise arbitrary"). This Court has applied the some evidence standard in evaluating habeas challenges to executive determinations in *less*

constitutionally sensitive areas than the wartime detention of captured enemy combatants.[13]

To be sure, in the cases in which the some evidence standard has been applied, the challenged executive determination is typically based on an administrative record developed after an adversarial proceeding. However, the standard also offers an appropriate guidepost in the context of the judicial review of an Executive's enemy combatant determination in wartime in light of the constitutional imperative of ensuring that the courts do not become entangled in matters textually committed by the Constitution to the Commander in Chief. See Part IV, *infra*; J.A. 342 ("Separation of powers principles must * * * shape the standard for reviewing the government's designation of Hamdi as an enemy combatant."). The some evidence standard offers a way to avoid such entanglement while also providing for judicial review of the military's enemy-combatant determination, because it focuses on the factors on which the Executive based the challenged determination.

While necessarily limited in scope, the some evidence standard offers a legal framework for assuring that the

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[13] See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 306 (2001) (deportation order: Prior to the 1952 Immigration and Nationality Act, "courts generally did not review factual determinations made by the Executive" in a habeas proceeding "other than the question whether there was some evidence to support the order") (citations omitted); *Eagles* v. *Samuels*, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); *United States* v. *Commissioner*, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding [of culpability]").

Executive is not detaining an individual arbitrarily. As discussed above, the sworn declaration presented by the government in its return provides a more than ample basis for the military's determination that Hamdi is indeed an enemy combatant and thus satisfies the some evidence standard. If a court disagreed, however, the proper course would be to permit the Executive to present additional evidence concerning its enemy-combatant determination and not, as petitioners suggest, to order discovery or evidentiary proceedings.[14]

III. THE NECESSARILY LIMITED SCOPE OF REVIEW IN THIS EXTRAORDINARY CONTEXT COMPORTS WITH THE CONSTITUTION AND THE FEDERAL HABEAS STATUTES

Petitioners argue that Hamdi is entitled to more "muscular judicial review" (Br. 26) of his wartime detention, a full-blown evidentiary proceeding, and immediate access to counsel. See *id.* at 10-11, 17, 19. The court of appeals correctly rejected those arguments and held that no further proceedings or access to counsel was required to establish the lawfulness of Hamdi's detention.

[14] The Court has applied a similar inquiry in analogous contexts. For example, in *Moyer* v. *Peabody*, 212 U.S. 78 (1909), the Court rejected the due process challenge of a person who had been detained without probable cause for months by a governor acting in his capacity of "commander in chief of the state forces" during a local "state of insurrection." *Id.* at 82. Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." *Id.* at 85. Likewise, in *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (emphasis added), the Court—citing *Moyer*—stated that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom *the government* believes to be dangerous."

A. Neither The Suspension Clause, The Habeas Statutes, Nor The Common Law Requires Additional Proceedings

1. Petitioners argue (Br. 25, 41) that Hamdi's detention and the limited scope of judicial review provided by the court of appeals violates the Suspension Clause. U.S. Const. Art. I, § 9, Cl. 2. That argument is without merit. The court of appeals made clear that Hamdi was entitled to judicial review of his detention in this habeas proceeding, and the government has never contested that point. J.A. 429. As the court of appeals explained, "the fact that [it did] not order[] the relief Hamdi requests is hardly equivalent to a suspension of the writ." J.A. 434 n.5. To the contrary, the court of appeals carefully considered and rejected petitioners' challenges to Hamdi's wartime detention. Furthermore, cases like *Quirin* and *Yamashita* demonstrate that appropriate limits on the scope of judicial review available in a habeas proceeding in constitutionally sensitive areas are not tantamount to a "suspension of the writ."[15]

2. Petitioners argue (Br. 10-11, 14-15) that the habeas statute entitles Hamdi to fact-finding in this case. That argument also should be rejected. The habeas statutes allow for presenting facts or taking evidence only when necessary to enable a court to resolve the legality of the challenged detention. As the Court observed in *Walker* v. *Johnston*,

[15] In *St. Cyr*, 533 U.S. at 301 (internal quotation marks omitted), this Court observed that, at a minimum, "the Suspension Clause protects the writ as it existed in 1789." Generally speaking, one of the purposes of the common law writ was to require the Executive to state why it was holding an individual, and not for a court to review the factual basis for the Executive's decision. See, *e.g.*, Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1094 (1995) ("At common law, the allegations in the 'return' were deemed conclusive and could not be controverted by the prisoner."); Dallin H. Oaks, *Legal History in the High Court–Habeas Corpus*, 64 Mich. L. Rev. 451, 453 (1966). Moreover, as explained below, at common law habeas corpus generally was unavailable for captured enemy combatants.

312 U.S. 275, 284 (1941), "the court may find that no issue of fact is involved" after examining the petition and return, and may conclude "from undisputed facts or from incontrovertible facts" that, "as a matter of law, no cause for granting the writ exists." See, *e.g.*, *Eisentrager*, 339 U.S. at 778 (citing *Walker*); *Quirin*, 317 U.S. at 24 (same). The Court has similarly recognized that a habeas petition may be denied without production of the detainee. See *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494 (1973) (observing that Congress has "codif[ied] in the habeas corpus statute" the Court's decision in *Walker* "whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim") (citing 28 U.S.C. 2243).

Thus, as the court of appeals observed, "[w]hile the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case—whether further factual exploration" is necessary and appropriate in light of the extraordinary constitutional interests at stake. J.A. 440-441. As explained in Part II above, the court of appeals properly concluded that the habeas petition in this case could be disposed of on the current record without "further factual exploration." J.A. 440.

3. Petitioners suggest (Br. 26) that the habeas proceeding in this case was imcompatible with the "common law role" of the Great Writ. They are mistaken. As a historical matter, the writ generally was not extended to enemy combatants. See R.J. Sharpe, *The Law of Habeas Corpus* 112 (1976) (Under the writ's common law tradition, "a prisoner of war has no standing to apply for the writ of habeas corpus."); see also, *e.g.*, *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) ("The courts of England * * * will not even grant a habeas corpus in the case of a prisoner of war * * *. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious."); *Ex parte Graber*, 247 F. 882, 886-887

(N.D. Ala. 1918) (consistent with the practices of England and Canada, executive's decision to detain an enemy combatant is unreviewable); *Ex parte Liebmann*, 85 K.B. 210, 214 (1915) ("It is * * * settled law that no writ of *habeas corpus* will be granted in the case of a prisoner of war."). Hamdi, whose wartime detention has been carefully reviewed by the courts, has received much more process in this habeas proceeding than a captured enemy combatant would have received at common law.

B. Hamdi Was Not Entitled To Any Automatic Or Immediate Access To Counsel

Petitioners argue (Br. 19) that Hamdi has "a right to consult with an attorney in connection with the assertion of [his] legal rights," and that he was deprived of due process because he was not granted access to a lawyer immediately upon the filing of this habeas action. That argument should be rejected. Indeed, the notion of requiring the military to afford captured enemy combatants with an attorney to help plot a legal strategy to gain their release by a court is antithetical to the very object of war.[16]

1. There is no right under the law of war for an enemy combatant to meet with counsel to contest his wartime detention. Even lawful enemy combatants who are entitled to POW privileges under the GPW—which does not include the detainees in the current conflict, see note 9, *supra*—are not entitled to counsel to challenge their detention. Rather, Article 105 of the GPW provides only that a POW may be afforded counsel in the event that formal *charges* are initiated against him in a prosecution, underscoring that POWs

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[16] Even the district court—which ordered that Hamdi be given immediate access to counsel—acknowledged that an enemy combatant who was captured during the Battle of the Bulge would not have been entitled to counsel to challenge his detention in Germany or, as was the case for thousands of captured combatants in World War II, in this country. J.A. 213. The unconventional nature of the present conflict—in which America has been attacked by the enemy on a scale greater than the attack on Pearl Harbor—does not warrant any different result.

who have not been charged with specific war crimes enjoy no right to counsel to challenge their detention. 6 U.S.T. at 3317; see also Winthrop, *supra*, at 165 (even with respect to military commissions, "the admission of counsel for the accused in military cases, is not a right but a privilege only").

The enemy combatants in *Quirin* were charged with violations of the law of war and of the Articles of War—offenses punishable by death—and tried before a military commission. 317 U.S. at 22-23. Accordingly, they were provided counsel by the military to aid in preparing a response to those charges. Hamdi, by contrast, has not been charged with any offense and has not been subjected to any military trial or punishment. Rather, as discussed, he is simply being detained during the conflict as a simple war measure. The vast majority of combatants seized in a war are, like Hamdi, never charged with an offense but instead are detained to prevent them from rejoining the fighting.

2. Nor was Hamdi entitled to access to counsel to challenge his detention under the Due Process Clause of the Fifth Amendment.[17]

a. Recognizing such a generalized right to counsel under the Fifth Amendment could not be squared with the fact that captured enemy combatants have not been guaranteed a right to counsel in similar circumstances. As this Court stated in *Quirin*, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." That is consistent with the analysis that this Court applies in

[17] The Sixth Amendment applies only in the case of "criminal prosecutions," U.S. Const. Amend. VI, and therefore does not apply to the detention of any captured enemy combatant who—like the vast majority of such combatants—has not been charged with any domestic crime. Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not apply to this situation. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

determining the scope of the Due Process Clause in other contexts. See *Herrera* v. *Collins*, 506 U.S. 390, 407-408 (1993) (examining "[h]istorical practice" in assessing scope of "Fourteenth Amendment's guarantee of due process"); *Medina* v. *California*, 505 U.S. 437, 445-446 (1992); *Moyer*, 212 U.S. at 84. Because the automatic right of access to counsel that petitioners seek has no foundation in any tradition or practice, the Fifth Amendment could not possibly confer such a right.

b. Moreover, as the court of appeals recognized, any process that Hamdi is due in this proceeding must take its form from the constitutional and national security limitations on a habeas proceeding in this sensitive context. See J.A. 427-430; *Moyer*, 212 U.S. at 84 ("[W]hat is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation."). Under any constitutionally appropriate standard of review (see Part II, *supra*), there is no cause for a detained enemy combatant to enjoy a generalized right to counsel to challenge the Executive's core Article II judgment that he is an enemy combatant. That is certainly true in this case, where, as the court of appeals correctly held, the record adequately demonstrates the lawfulness of Hamdi's wartime detention.

In *Quirin*, 317 U.S. at 45, this Court observed that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission." So too, the Fifth Amendment does not restrict the Commander in Chief's constitutional authority to detain captured enemy combatants during ongoing hostilities. Granting such combatants access to counsel based solely on the filing of a habeas petition on their behalf would directly interfere with the Executive's war powers by, *inter alia*, thwarting intelligence-gathering efforts. It is difficult to overstate the manner in which bestowing such an extraordinary right on

the enemy could interfere with legitimate—and potentially vital—military objectives in wartime.[18]

c. In addition, any due process analysis would have to account for the Executive's compelling interest—especially during the initial stages of an individual's detention—in preventing a captured enemy combatant from enjoying access to counsel or others. As explained in detail in the Woolfolk Declaration (J.A. 347-351), to a degree perhaps greater than in any prior armed conflict in which the United States has been engaged, "[t]he security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence." J.A. 347.[19] The military has found that a critical source of such intelligence is enemy combatants who are captured in connection with the conflict. J.A. 348. With respect to Hamdi, the military determined that "Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaeda training and operations." J.A. 350.

The military has learned that creating a relationship of trust and dependency between a questioner and a detainee is of "paramount importance" to successful intelligence gather-

[18] The habeas context in which this case arises is also significant. This Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987); *Murray* v. *Giarratano*, 492 U.S. 1 (1989) (plurality); see also *United States* v. *Gouveia*, 467 U.S. 180 (1984) (no right to counsel during period of administrative detention). A captured enemy combatant is not entitled to a different rule.

[19] Attempting to gather intelligence from captured enemy combatants that may help win the war or prevent additional attacks is a well-established practice in warfare. See Levie, *supra*, at 108-109; Commentary III, *supra*, at 163-164 ("[A] State which has captured prisoners of war will always try to obtain military information from them.") (footnote omitted). The importance of intelligence-gathering in the current conflict is also discussed in the Declaration of Vice Admiral Lowell E. Jacoby filed in the Joint Appendix in *Padilla*, *supra*, 03-1027 J.A. 75-88.

ing. J.A. 349. The formation of such a relationship takes time and varies from one detainee to another, but when such a relationship is formed, critical intelligence may be—and has been—gathered. J.A. 348-349. The intelligence collected to date from captured enemy combatants has proven vital to the strategic military operations that are ongoing in Afghanistan (such as in learning the routes that the enemy uses to travel through difficult terrain) as well as in understanding the manner in which the enemy operates (including how it communicates, recruits members, and obtains funding). See *Guantanamo Detainees*, *supra*.

This critical source of information would be gravely threatened if this Court held that the moment a next-friend habeas petition is filed on behalf of a captured enemy combatant, a right of access to counsel automatically attaches with respect to the detainee. As Colonel Woolfolk stressed in this case, "[d]isruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic" and, "[s]hould this occur, a critical resource may be lost, resulting in a direct threat to national security." J.A. 349. Colonel Woolfolk further explained that, during the proceedings below, the military had determined that granting Hamdi access to counsel would have "disrupt[ed] the secure interrogation environment that the United States has labored to create" with respect to Hamdi, and would "thwart any opportunity to develop intelligence through this detainee." J.A. 350.

d. Although a captured enemy combatant has no absolute right to counsel to challenge his detention, the Department of Defense has adopted a policy of providing enemy combatants who are presumed United States citizens and detained in this country access to counsel once the military has determined that such access would not interfere with ongoing intelligence-gathering with respect to the detainee. In Hamdi's case, the military determined in December 2003 that such access would be appropriate. Especially in light of the military's adoption of that policy, the compelling national

security interests in permitting the military to engage in such intelligence gathering, and the ordinary canon of constitutional-avoidance, the Court should reject petitioners' argument that Hamdi was entitled to an absolute and immediate right to counsel to challenge his detention. Such access, automatic and as of right, would defeat one of the critical purposes of detaining the enemy.[20]

In this extraordinarily sensitive national security context, the Court should be wary of adopting a means of testing the validity of an enemy combatant's detention that defeats one of the important military functions served by that detention, even when, as here, the Executive has supplied the factual basis for the detention and a court has determined that it is lawful. Rather, the appropriate constitutional balance would allow an immediate opportunity to bring legal challenges to detention in a habeas proceeding such as this, and would afford access to counsel at the point that the commanders who are responsible for gathering intelligence in wartime—as well as defending the Nation from additional attacks and defeating the enemy in an ongoing conflict reach a judgment that such access would not interfere with those vital efforts. Declining to resolve the counsel issue in this case would not foreclose the possibility of entertaining a later challenge to the delay in granting access to counsel.

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[20] The military has a unique institutional capacity to make wartime determinations about when granting such a detainee access to counsel would interfere with intelligence-gathering efforts or other national-security concerns. As Judge Randolph recently observed, "[t]he level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause—these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain." *Al Odah* v. *United States*, 321 F.3d 1134, 1150 (D.C. Cir.) (concurring), cert. granted, 124 S. Ct. 534 (2003).

In any event, particularly in light of the fact that Hamdi now has access to counsel, the Court should avoid any ruling in this case that would attempt to place a particular time limit on the military's efforts to gather intelligence from a captured combatant. Holding that the military must grant a detained enemy combatant access to counsel within a specified period of time could in many cases prove just as damaging in terms of the loss of potential intelligence as holding that a detainee must be granted counsel as soon as he is placed in military custody.[21]

3. Although they did not press the argument below (see Opp. 33-34), petitioners argue (Br. 19) that denying Hamdi access to counsel is inconsistent with decisions of this Court indicating that prison inmates have a "right to court access." But that line of cases arose in the distinctly different context of inmates who had been committed to the criminal justice system to serve sentences of imprisonment. Moreover, even in that distinct context, the Court has recognized that any constitutional right of prisoners to access courts may be limited by state regulation that is reasonably related to legitimate penological interests, such as maintaining prison security or order. See *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Not only is allowing captured enemy combatants access to the courts fundamentally inconsistent with the law of war, but, as discussed above, it could frustrate the military's efforts to gather potentially critical intelligence from an enemy combatant.

Furthermore, although he has not appeared personally in this action, Hamdi has received access to the courts through his father, as next-friend. The habeas statute expressly

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[21] There is another compelling interest in preventing enemy combatants from enjoying access to counsel before the military determines that such access would not undermine national security. Such access may enable detained enemy combatants to pass concealed messages through unwitting counsel to the enemy which could compromise the war effort— something that members (and presumably supporters) of al Qaeda are trained to do. J.A. 350.

contemplates that a detainee may be inaccessible, and thus authorizes a proper next-friend to bring an action on his behalf. 28 U.S.C. 2241. Next-friend standing is available only on a showing, *inter alia*, that "the real party in interest cannot appear on his own behalf to prosecute the action," and that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Whitmore*, 495 U.S. at 163. Thus, appointment of a next-friend serves as a mechanism by which an "inaccessible" (*ibid.*) or incapacitated detainee may effectively gain access to the courts. Through this next-friend action, the legality of Hamdi's wartime detention has been rigorously tested by the courts. That is a traditional function of the next-friend doctrine in habeas actions and, especially in the unique circumstances of this case, it does not violate any right of access recognized by this Court.[22]

IV. THE ALTERNATIVE PROCEEDING ENVISIONED BY THE DISTRICT COURT AND PETITIONERS IS CONSTITUTIONALLY INTOLERABLE

The type of proceeding ordered by the district court and urged by petitioners is fraught with constitutional problems.

1. The district court proceedings offer a glimpse as to what a habeas proceeding might be like under the alternative legal regime urged by petitioners. Pet. Br. 14-20. After the government explains the factual basis for its enemy combatant determination, a habeas petitioner would–

[22] Hamdi is no longer strictly inaccessible because, since December 2003, he has been permitted to meet with counsel. Nonetheless, the court of appeals' judgment was based on the premise that this was a proper next-friend action. J.A. 419 n.2. In addition, the fact that Hamdi now has access to counsel in no way alters the court of appeals' conclusion that the record in this case is sufficient to support the conclusion that Hamdi's detention is lawful. However, if Hamdi were to file a new direct habeas petition raising new arguments that could not have been brought in this action, the courts could entertain that petition subject to the customary restraints on duplicative litigation and the constitutional considerations discussed above.

as any "capable attorney" could do—"challenge the hearsay nature of the [military's] declaration and probe each and every paragraph for incompleteness or inconsistency." J.A. 446. The district court sought to do that at the August 13, 2002 hearing where it "challeng[ed] everything in the Mobbs Declaration." J.A. 227. Petitioners repeat many of the same challenges. See Pet. Br. 5-6.[23] As the court of appeals explained, however, "[t]o transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch." J.A. 446.

2. The standard of review applied by the district court and requested by petitioners (see Br. 10-11, 15) also inevitably would invite discovery into the military's decision-making in connection with ongoing military operations. The district court below issued an unprecedented production order requiring the military to produce "for in camera review by the Court" materials including:

- "Copies of all Hamdi's statements, and the notes taken from any interviews with Hamdi";
- "A list of all the interrogators who have questioned Hamdi, including their names and addresses"; and
- "Copies of any statements by members of the Northern Alliance regarding [Hamdi]."

J.A. 185-186. What is more, as the court of appeals observed, "[t]he district court indicated that its production order might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status." J.A. 439. The district

[23] An enemy combatant, armed with court-appointed counsel, would have every incentive to challenge the military's version of events and to encourage an attorney to do so on his behalf. Indeed, members of al Qaeda, and presumably their supporters, are trained to deceive authorities about their identities and their role in the organization. See <www.usdoj.gov/ag/manualpart1_1.pdf.> (reproducing al Qaeda training manual).

court's request for the names *and addresses* of soldiers who interviewed Hamdi suggests that it viewed them as potential witnesses in a full-blown evidentiary proceeding.

Attempting to compile such materials would directly intrude into the military's conduct of an ongoing campaign. As the court of appeals explained:

> The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

J.A. 442; see also J.A. 461-464 (Wilkinson, J., concurring in the denial of rehearing) ("This desire to have the courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.").

Any effort by a court to recreate the scenes of Hamdi's capture and detention are complicated by two particular factors in this case. First, Hamdi was captured half-way around the globe in Afghanistan, a country in which thousands of U.S. armed forces are today engaged in active combat operations against al Qaeda and Taliban fighters. Second, Hamdi initially surrendered with his Taliban unit to Northern Alliance forces. See J.A. 149 (Mobbs Decl. ¶ 4). It is not uncommon for the U.S. military to take control of enemy combatants who have been captured by or who surrender to coalition forces. But the fact that only Northern Alliance forces were present at the moment of Hamdi's

surrender would further complicate any judicial effort to recreate Hamdi's battlefield capture in a habeas proceeding.

This Court itself has recognized the grave practical and constitutional concerns that would arise from enmeshing the courts in such inquiries while the Nation is at war. In *Eisentrager*, the Court observed that habeas proceedings delving into the military's treatment of enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy." 339 U.S. at 779. Indeed, the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.* "Nor is it unlikely," the Court continued, "that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Ibid.*

More fundamentally, the evidentiary inquiry ordered by the district court is incompatible with the conduct of war—and the constitutional commitment of the war power to the political branches. When the Commander in Chief has dispatched the armed forces to repel a foreign attack on this country, the military's duty is to subdue the enemy and not to prepare to defend its judgments in a federal courtroom. As Judge Wilkinson observed, subjecting the military's battlefield determination that Hamdi is an enemy combatant to further fact-finding "would ignore the fundamentals of Article I and II—namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war." J.A. 461 (concurring in the denial of rehearing) (citing *The Prize Cases*, 67 U.S. (2 Black) at 670)).[24]

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[24] Petitioners point (Br. 27) to *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851), and *Sterling* v. *Constantin*, 287 U.S. 378 (1932). However, those cases do not support the type of factual development that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

JOHN A. DRENNAN
Attorney

MARCH 2004

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petitioners have in mind with respect to the challenged enemy-combatant determination in this case. See Br. in Opp. 30-32. Moreover, those cases predate the far more relevant observations that this Court made in *Eisentrager*, discussed above. Petitioners' analogy (Br. 27) to the law of prize is also inapt. Discovery in prize proceedings was typically limited in scope to evidence taken from the captured vessel, see, *e.g.*, *The Springbok*, 72 U.S. (5 Wall.) 1, 9-10 (1866), and usually occurred after hostilities had ended.

(27)

No. 03-6696

In The Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender
FRANCES H. PRATT
Research and Writing Attorney

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

GEREMY C. KAMENS
Assistant Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Respondents urge ratification of unchecked and uncheckable executive authority to indefinitely detain citizens seized in a place the Executive decides is a location of armed conflict. According to Respondents, Yaser Esam Hamdi ("Hamdi"), a citizen[1] who has been held indefinitely in solitary confinement in a military prison for over two years, cannot seek judicial review of the factual basis for his imprisonment. Moreover, Respondents claim that Congress has not authorized judicial inquiry or limited the Executive's authority to imprison Hamdi. These arguments urge a radical change in constitutional doctrine and a departure from historical practice.

The Founders were acutely aware of the dangers posed by the accumulation of military power by a single ruler "independent of and superior to the Civil Power." *The Declaration of Independence* para. 14 (1776). Through their design, the Constitution disperses enumerated powers among three branches of government, and ensures that procedural guarantees protect against the arbitrary deprivation of liberties. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 . . . not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."). For this reason, the effectively incommunicado imprisonment of a citizen solely on the authority of the military, with no opportunity for any hearing to test

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[1] Hamdi is indisputably a citizen by birth notwithstanding that he was raised abroad by alien parents. *See Mandoli v. Acheson*, 344 U.S. 133 (1952); *Perkins v. Elg*, 307 U.S. 325 (1939).

the factual basis for the prolonged detention, offends the nation's first and most enduring principles.

This case is not about the power of the Executive to engage in defensive wars or to avert immediate threats to the security of the country. *Cf. The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Rather, this case turns on whether the Executive has the power to detain a citizen without explicit sanction from Congress far from any theater of conflict and more than two years after any exigency has grown stale. What separates the parties is a competing view of the separation of powers – one in which the Judiciary is entrusted to review, and the Legislature is empowered to limit, the detention of citizens by the Executive, and another in which all power over citizens declared by the military to be "enemy combatants" is held exclusively by the Executive branch and is subject to only cursory judicial review. Reversing the decision below will ensure constitutional protection in the handful of cases in which the Executive claims that an American citizen is an "enemy combatant" but chooses not to prosecute for a criminal offense or an offense against the laws of war. An affirmance will unleash a new and far-reaching executive power to imprison citizens indefinitely that cannot be restrained by the other two branches of government.

ARGUMENT

I. DUE PROCESS GUARANTEES THE RIGHT TO BE HEARD

The Fourth Circuit's refusal to permit "any inquiry," J.A. 448, *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003), into the facts underlying Hamdi's detention, or even to allow Hamdi to respond to the allegations advanced to support his confinement, finds no basis in the Constitution. A proceeding in which a party "was never afforded a proper opportunity to respond to the claim against him . . .

has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000). The denial of the opportunity to be heard has no place in a habeas proceeding challenging the lawfulness of a citizen's imprisonment.

Nonetheless, Respondents assert that Hamdi has no right to participate in this proceeding or to challenge the factual basis for his imprisonment because: (1) any additional factual inquiry would violate separation of powers, Resp. Br. 12, 25-27; (2) such inquiry is not required by the Suspension Clause, *id.* at 37-39; and (3) the record sufficiently establishes Hamdi's status as an "enemy combatant" without need for additional factual development, *id.* at 27-36. While Hamdi's case arises in an undeniably sensitive context, his claims raise no new issues under the sun. *Ecclesiastes* 1:9. Only the Fourth Circuit and Respondents' misconstruction of separation of powers doctrine is without precedent.

A. Judicial Review Is Central to the Separation of Powers

Respondents repeatedly claim that "the nature of judicial review . . . is limited by . . . profound separation-of-powers concerns." Resp. Br. 12; *see also id.* at 25-27. But their position and the Fourth Circuit's ruling below are destructive to both the historic function of habeas and the role of the Judiciary as a check on the other branches.

Article III of the Constitution is designed to preserve review by an independent judiciary free of control by the other branches. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). In accordance with this constitutional scheme, courts have not hesitated to review the factual basis for the claim that a citizen is an enemy belligerent. As explained in Hamdi's opening brief, Pet. Br.

26, this Court reviewed a full factual record and rejected the government's claim in *Ex parte Milligan* that the petitioner was a prisoner of war and could be "held, under the authority of the United States, until the war terminate[d]." 71 U.S. (4 Wall.) 2, 21 (1866) (government's argument). Similarly, the district court in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), held a factual hearing to address the same question. Respondents make no claim that these cases "unsettle[d] the constitutional balance." J.A. 442, 316 F.3d at 471. Indeed, Respondents actually concede that courts have authority to determine whether "the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*." Resp. Br. 27. That is precisely what the district court attempted to do in this case.

In a footnote, Respondents distinguish this Court's opinions in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), *Sterling v. Constantin*, 287 U.S. 378 (1932), and prize cases by explaining that they "do not support the type of factual development that petitioners have in mind with respect to the challenged enemy-combatant determination in this case." Resp. Br. 49-50 n.24. But that is not the question. The question is whether a constitutional barrier exists to preclude judicial review of the facts related to military seizures generally, and determinations of enemy combatant status in particular. *Milligan*, *Mitchell*, *Sterling*, and *Territo*, as well as innumerable prize cases, all say that no such barrier exists.

Moreover, the cases cited by Respondents and amici either are expressly limited to aliens,[2] have nothing to do

[2] *Harisiades v. Shaughnessy*, 342 U.S. 580, 581 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 765, 768-69 (1950); *Hirota v. MacArthur*, 338

(Continued on following page)

with separation of powers,[3] involve a challenge by enemy aliens to an international tribunal and state that citizens should receive judicial review under such circumstances,[4] relate to military personnel or congressional legislation of military affairs,[5] or have nothing to do with review of military seizures of persons.[6] The premise of the Fourth Circuit's opinion, that courts are limited by separation of powers from inquiring into the facts supporting Hamdi's detention, J.A. 449, 316 F.3d at 474, simply has no basis in precedent or separation of powers doctrine.

U.S. 197, 199 (1948) (Douglas, J., concurring); *Ludecke v. Watkins*, 335 U.S. 160, 162-63 (1948).

[3] *Ludecke*, 335 U.S. at 163-64; *In re Yamashita*, 327 U.S. 1, 8 (1946). Amicus American Center for Law and Justice's assertion that the detention of a citizen can be a "political question," and therefore immune from judicial review, Amicus Br. 15 et seq., is contrary to precedent. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942); *In re Yamashita*, 327 U.S. at 9; *cf. Williams v. Rhodes*, 393 U.S. 23, 40 (1968) (Douglas, J., concurring) (noting that "fundamental rights and liberties" have a "well-established claim to inclusion in justiciable, as distinguished from 'political,' questions"). Hamdi's habeas petition does not challenge the wisdom of foreign policy choices, but the lawfulness of government detention – a subject that has always been considered justiciable. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[4] *Hirota*, 338 U.S. at 205, 209 (Douglas, J., concurring).

[5] *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality); *Cox v. United States*, 332 U.S. 442, 448 (1947). In *Burns*, 346 U.S. at 142, a plurality noted that federal courts could review a military serviceman's claims of error arising from a court martial "de novo" through habeas if the military "manifestly refused to consider" those claims, a conclusion supported by the opinion of Justice Frankfurter as well as that of dissenting Justices Douglas and Black.

[6] *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988); *Rostker*, 453 U.S. at 59; *Haig v. Agee*, 453 U.S. 280 (1981); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

B. Refusal to Permit Inquiry Into the Facts Violates the Suspension Clause

Respondents contend that the Suspension Clause ensures no greater review than that afforded Hamdi because under the common law: (1) the government's return could not be controverted; and (2) prisoners of war were not entitled to relief. Respondents are wrong.[7]

First, Respondents ignore the exception under the common law applied in cases of noncriminal executive detention. Pet. Br. 25. In such cases, the general rule against controverting the return did not apply and courts were able to review the factual basis for the detention.[8]

Second, under the common law, individuals could contest by habeas whether they were in fact prisoners of war.[9] This principle has been recognized not only by courts in the United States,[10] but also by authorities cited by Respondents.[11]

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[7] Respondents' assertion that Petitioners have "abandoned" the second claim in the habeas petition, Resp. Br. 6 n.3, is erroneous. Petitioners have consistently maintained that the Fourth Circuit's refusal to permit judicial review of facts violates the Suspension Clause. *See* Pet. Br. 25-26; Pet. Cert. 22-24; J.A. 434 n.5, 316 F.3d at 467 n.5.

[8] *See* Br. of Amici Curiae Former Federal Judges et al., at 19 (collecting cases); Br. of Amici Curiae Law Professors with a Particular Interest in Habeas Corpus Law, *Rumsfeld v. Padilla*, No. 03-1027, at 12-15.

[9] *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779); *R. v. Schiever*, 97 Eng. Rep. 551, 552 (K.B. 1759); *see also* Br. of Amici Curiae Legal Historians, *Rasul v. Bush*, Nos. 03-334, 03-343, at 20-22; Br. of Amici Curiae Commonwealth Lawyers Ass'n, *Rasul v. Bush*, Nos. 03-334, 03-343, at 26-28.

[10] *In re Fagan*, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4,604) ("The writ of habeas corpus had long been in frequent use, in a great variety of cases . . . [including those by] persons detained under military authority as soldiers or prisoners of war."); *In re McDonald*, 16 F. Cas.

(Continued on following page)

C. The Factual Record Cannot Support Hamdi's Detention

Respondents maintain that the one-sided factual record consisting solely of the Mobbs declaration – which is all that the district court was allowed to consider, J.A. 352-53 – is sufficient to establish that Hamdi is an "enemy combatant." Resp. Br. 27-34. Respondents are wrong.

1. For starters, Respondents rely upon facts outside the Mobbs declaration: the location of Hamdi's capture, *compare* Resp. Br. 1, 6, 10, 18, 33-34, 48 *with* J.A. 149 ¶ 4; the standards and criteria supposedly used in the military's screening process, *compare* Resp. Br. 3-4 *with* J.A. 149 ¶¶ 5-8; representations about Hamdi's intelligence value, Resp. Br. 42; and irrelevant information about al Qaeda, Resp. Br. 47 n.23.[12] This resort to facts that go beyond what the district court was permitted to review implicitly concedes that the Mobbs declaration is insufficient to support Respondents' claims.

In addition, Respondents and the court of appeals rely upon an alleged concession as to the location of Hamdi's capture, Resp. Br. 29-33; J.A. 443, 316 F.3d at 471, that

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17, 79 (E.D. Mo. 1861) (No. 8,751) (holding that Missouri militiaman seized by Union forces was entitled to seek relief by means of habeas corpus).

[11] *See* R.J. Sharpe, *The Law of Habeas Corpus* 113 (1976) (noting that if "it appears that he may have been improperly detained as a prisoner of war . . . the court will investigate the propriety of the detention"); *The King v. Superintendent of Vine Street Police Station, ex parte Liebmann*, 1 K.B. 268, 274 (1916) ("I will consider in the first place whether Liebmann is an alien enemy.").

[12] Respondents have never alleged any relation between Hamdi and al Qaeda.

was not conceded in fact,[13] and could not be conceded in law because Hamdi was not permitted to meet with counsel at any relevant time during the litigation.[14] Respondents argue that prisoners of war have no general right to counsel under international law, and no right to "automatic" or "immediate" access to counsel at all. Resp. Br. 39-42. But these arguments both mischaracterize Hamdi's claims and reason in a circle that because Hamdi is an enemy combatant, he has no right to confer with counsel to contest that he is an enemy combatant.[15]

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[13] *See, e.g.*, Pet. Cert. 5 (noting that Hamdi *resided* in Afghanistan in Fall 2001); J.A. 500-03, *Hamdi v. Rumsfeld*, 337 F.3d 335, 360-62 (4th Cir. 2003) (Luttig, J., dissenting from denial of reh'g en banc) (explaining that identification of *residence* is not the same as conceding the place of *seizure*).

[14] *See Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890) ("[A] next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him."); *see also White v. Miller*, 158 U.S. 128, 146 (1895).

[15] Under the Due Process Clause, Hamdi is entitled to access to counsel appointed by the district court pursuant to 18 U.S.C. § 3006A(a)(2)(B) at a time that allows meaningful participation in the proceedings. Respondents incorrectly allege that this argument was not "pressed" below. Resp. Br. 45. Hamdi raised his due process claim to access to appointed counsel when Respondents challenged the district court's order permitting access. *See* Reply Cert. 9-11. The claim was therefore preserved for review upon the issuance of a final order. *See United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950).

Respondents correctly observe that what process is due depends on the circumstances – but fail to acknowledge that the Constitution demands more process in the case of an indefinite detention than one that is relatively brief. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (noting that in case of long-term detention, "the length of the imprisonment would raise a different question"). Respondents' assertion that incommunicado detention is necessary to gather intelligence was not

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Most importantly, the Executive has no authority to unilaterally select the evidence upon which a habeas proceeding is decided,[16] or to obtain summary dismissal in the face of a material factual dispute.[17] Given Respondents' concession that courts faced with a habeas petition by an alleged "enemy combatant" must decide whether "the detained individual falls on the proper side of the line that divides this Court's decisions in *Milligan* and *Quirin*," Resp. Br. 27, a material dispute exists, at the very least, about whether Hamdi is an "enemy combatant." Hamdi should have been allowed to adduce evidence and challenge the facts submitted by Respondents on that issue.

2. Unwilling to rely upon the Fourth Circuit's separation of powers rationale which requires no evaluation of evidence, J.A. 449, 316 F.3d at 474, Respondents invoke the "some evidence" concept which has no place in this proceeding. "Some evidence," as Respondents concede, is not a standard of proof but a standard of review. Resp. Br. 35. It applies only when there has been some previous adjudicative process.[18] Here, there is none. Further, application of the "some evidence" standard would be incompatible with the principle that courts cannot defer to

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addressed by the Fourth Circuit below, J.A. 431 n.4, 316 F.3d at 466 n.4, and raises grave and novel constitutional issues that this Court should not address in a case in which the Department of Defense has conceded that access to counsel would not interfere with intelligence gathering needs. *See* Resp. Br. 8-9.

[16] *See Harris v. Nelson*, 394 U.S. 286, 298 (1969); *Walker v. Johnston*, 312 U.S. 275, 287 (1941); *cf. Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) (rejecting immigration commission's deportation determination because the immigration official simply excluded from the factual record evidence and testimony favorable to the petitioner).

[17] *Walker*, 312 U.S. at 286-87.

[18] *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 San Diego L. Rev. 631, 663-64 (1988).

factual findings that arise from a proceeding that is fundamentally unfair. *See Kwock Jan Fat*, 253 U.S. at 464. Application of the "some evidence" standard here also would mark the first time that this Court has required less than "clear and convincing" evidence to authorize a substantial deprivation of a citizen's liberty. *See Addington v. Texas*, 441 U.S. 418, 432-33 (1979).[19]

3. Lastly, even the one-sided facts in the record do not support the lawfulness of Hamdi's detention. They establish that Hamdi resided in Afghanistan during the fall of 2001, but that fact alone is indecisive because constrained residence in enemy territory does not imply "enemy" character even for purposes of prize law.[20] Moreover, in conclusory language, Hamdi is alleged only to have been "affiliated" with a Taliban unit. J.A. 148 ¶ 3.

[19] Because Hamdi is being held in solitary confinement in a prison, moreover, only criminal process would be sufficient to authorize his present detention. Pet. Br. 20-21. Respondents maintain that Hamdi is being held solely for non-punitive purposes, Resp. Br. 16 n.5, even though confinement in a prison has long been held to be unnecessary and inappropriate to detain prisoners of war. *See* William E.S. Flory, *Prisoners of War* 41 (1942). Indeed, as far back as 1785, the United States entered into a treaty prohibiting confinement of prisoners of war "in convict prisons and the use of irons." L. Oppenheim, *International Law* § 125 (H. Lauterpacht ed., 7th ed. 1952). Whether or not international law and military regulations permit such treatment here, Hamdi's solitary confinement in a prison – without daylight and in irons – violates substantive due process. *Cf. United States v. Salerno*, 481 U.S. 739, 747 (1987).

[20] *Cf. The Peterhoff*, 72 U.S. (5 Wall.) 28, 60 (1867) (enemy status based on residence rule "has never held in respect to persons faithful to the Union. Such citizens . . . lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country."); *Guessefeldt v. McGrath*, 342 U.S. 308, 320 (1952) (finding that forty-two year German resident of Hawaii involuntarily detained in Germany during World War II was not an "enemy" for purposes of the Trading with the Enemy Act).

The sole reference in the Mobbs declaration suggesting that Hamdi was a "combatant" states that, before September 11, 2001, Hamdi agreed to fight only "if necessary." J.A. 149 ¶ 5. Neither reference explains the extent of Hamdi's "affiliation," or suggests that Hamdi ever fought for the Taliban, or even that he agreed to fight after hostilities began with the United States. If "affiliation" is the operative question for purposes of determining "enemy combatant" status,[21] therefore, the Mobbs declaration supplies no information to permit the Court to assess the use of that term here. *Cf. Rowoldt v. Perfetto*, 355 U.S. 115, 120-21 (1957) (holding that record based on petitioner's confession of affiliation was "too insubstantial to support the order of deportation" predicated upon "membership" in Communist party).

Hamdi is entitled to a meaningful habeas corpus proceeding. Unless he is permitted to respond to the allegations against him with the assistance of appointed counsel, the habeas proceeding is incompatible with rudimentary principles of due process.

II. CONGRESS CAN LIMIT THE EXECUTIVE'S AUTHORITY TO DETAIN ENEMY BELLIGERENTS

Congress "expressly vested plenary power in the federal courts" to investigate and weigh facts related to the legality of detention through habeas proceedings. *Wingo v. Wedding*, 418 U.S. 461, 468 (1974); *see also Holiday v. Johnston*, 313 U.S. 342, 351-52 (1941). Nevertheless, the Fourth Circuit concluded that adhering to 28

[21] The term "enemy combatant" is not a recognized status under international law or United States military regulations. Br. of Amicus Curiae Global Rights at 6-11.

U.S.C. §§ 2243, 2246, and 2248 in this case would run afoul of the separation of powers. J.A. 440-41, 316 F.3d at 470. Likewise, Respondents urge this Court not to construe another statute, 18 U.S.C. § 4001(a), in such a way that it would "conflict" with the Executive's authority as Commander in Chief to detain enemy combatants. Resp. Br. 22. The premise of these arguments – that Congress cannot limit the exclusive power of the Executive to detain enemy belligerents – is indefensible.

1. No "singular textual constitutional commitment of power" to the Executive to detain prisoners of war exists. *See* Resp. Br. 14 n.4. As an initial matter, Respondents inaccurately assert that the Constitution assigns the Commander in Chief, "in particular," the power to "provide for the common defense." Resp. Br. 13. That power, in fact, is vested in the Congress by virtue of section 8, clause 1, of Article I. Similarly, Respondents seek to appropriate Congress' war power by quoting *Stewart v. Kahn*, 78 U.S. 493 (1870), out of context. Resp. Br. 19. *Stewart* involved a challenge to a wartime statute and therefore speaks of *congressional* war power when it states that "[i]t carries with it inherently the power to guard against the immediate renewal of the conflict." 78 U.S. at 507.

Stewart illustrates that the Constitution devotes far more text to describe the war powers of the Congress than those of the Executive. "Indeed, out of seventeen specific paragraphs of congressional power, eight of them are devoted in whole or in part to specification of powers connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). The President, by contrast, is designated by the Constitution as the Commander in Chief of the armed forces, art. II, § 2, and is authorized to appoint and

commission officers, art. II, § 3, cl. 5.[22] The Constitution's emphasis on congressional, rather than executive, war power has permitted this Court to state almost without exaggeration that "[t]he whole powers of war [are], by the constitution of the United States, vested in congress." *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *see also Miller v. United States*, 78 U.S. 268, 305 (1870). The constitutional division of war powers between Congress and the Executive stands firmly against Respondents' claim to unrestrained executive authority to detain enemy belligerents.

2. Respondents also contend that the Executive's authority with respect to the detention of prisoners of war is "deeply rooted in this Nation's history." Resp. Br. 14. This too is inaccurate. During the Revolutionary War, the Continental Congress delegated authority with respect to prisoners of war to General Washington. Consequently, "General Washington, as commander in chief, received the authority to select the Commissary General of Prisoners." George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, at 8 (1955).

Congressional authority with respect to prisoners of war continued after ratification of the Constitution. In the

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[22] Respondents materially misquote *Eisentrager* to assert that the Commander in Chief power " 'of course' " includes " 'all that is necessary and proper for carrying [it] into execution.' " Resp. Br. 13 (quoting *Eisentrager*, 339 U.S. at 788). In fact, after describing the Constitution's grant of war power to *both* Congress and the Executive, this Court stated: "And, of course, grant of war power includes all that is necessary and proper for carrying *these* powers into execution." *Eisentrager*, 339 U.S. at 788; *cf. Ex parte Quirin*, 317 U.S. at 26 (enumerating congressional war powers, including power to enact necessary and proper legislation); *Stewart*, 78 U.S. at 506 ("Congress is authorized to make all laws necessary and proper to carry into effect the granted [war] powers.").

late eighteenth and early nineteenth centuries, the Congress regularly passed statutes that authorized the detention of prisoners of war. For example, Congress enacted statutes authorizing the detention[23] and exchange[24] of sailors during the undeclared war with France. As noted in Petitioner's opening brief, Pet. Br. 42, Congress also authorized the Executive to detain prisoners of war during the declared War of 1812.[25] And, Congress passed a statute regulating the capture of prisoners found on ships seized as prize.[26] These enactments establish that Congress plainly possesses authority by virtue of the Captures Clause, art. I, § 8, cl. 11, and surrounding language to enact legislation relating to the detention of prisoners of war.

3. Respondents' reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), do nothing to support a claim of exclusive executive authority with respect to the detention of prisoners of war. Resp. Br. 13-15. Indeed, *Quirin* and *Eisentrager* speak of the war powers held collectively by the Legislature and the Executive.[27]

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[23] *An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States*, 1 Stat. 574-75, § 4 (1798).

[24] *An Act concerning French Citizens that have been, or may be captured and brought into the United States*, 1 Stat. 624 (1799).

[25] *An Act for the safe keeping and accommodation of prisoners of war*, 2 Stat. 777 (1812).

[26] *An Act concerning Letters of Marque, Prizes, and Prize Goods*, 2 Stat. 759, § 7 (1812).

[27] As for *Duncan*, Respondents materially abbreviate the Court's dictum that the case did not involve the "well-established" authority of the military over members of the armed forces, or "enemy belligerents, prisoners of war, *or others charged with violating the laws of war*." 327

(Continued on following page)

4. Respondents also contend that the Executive's power over prisoners of war is established by the law of war. Resp. Br. 14. But Respondents fail to confront the argument that the law of war invests no authority in the Executive branch and does not speak to the constitutional division of powers between Congress and the Executive. *See* Pet. Br. 39 (citing *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)). And even the authorities cited by Respondents do not support the claim that citizens may be held as prisoners of war. *See* Oppenheim, *supra* note 19, § 86 ("[T]raitorous subjects of a belligerent who . . . fight in the armed forces of the enemy" "may be, and always are, treated as criminals.").

In sum, neither constitutional text nor legal history nor precedent nor international law establish that the authority to detain enemy belligerents is held exclusively by the Executive. Congressional legislation that affects the detention of alleged "enemy combatants," such as the habeas corpus statutes or 18 U.S.C. § 4001(a), therefore cannot violate the separation of powers.

III. ONLY CONGRESS POSSESSES THE AUTHORITY TO PERMIT THE LONG-TERM DETENTION OF CITIZENS

1. Respondents do not take issue as a general matter with the argument that the structure of the Constitution opposes the aggregation of unchecked authority by any branch. Instead, Respondents make four arguments to

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U.S. at 313-14 (citing *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946)) (emphasis added). *Cf.* Resp. Br. 14-15. Given the *Duncan* Court's citations and the language omitted by Respondents, the Court's language refers to individuals charged with violating the laws of war.

support the Executive's authority to detain Hamdi: (1) the power to detain citizens is incident to the Executive's power to engage in defensive war, Resp. Br. 19; (2) citizens are treated no differently than other belligerents, *id.* at 17 (citing *Ex parte Quirin*, 317 U.S. 1 (1942)); (3) the Executive has historically detained citizens as prisoners of war, *id.* at 15; and (4) 18 U.S.C. § 4001(a) does not apply, *id.* at 21. These arguments are unpersuasive.

First, the Executive's responsibility to respond to an attack on this country without waiting for legislation is predicated on the existence of circumstances that cannot wait for legislative action. *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Such circumstances have nothing to do with the detention of a citizen for over two years in the United States far from any area of conflict and long after any possible exigency related to the citizen has expired.

Second, Respondents fail to address the argument that the exercise of military jurisdiction over the citizen in *Quirin* was explicitly authorized by Congress. Pet. Br. 36-38. If the Executive possessed authority to try a citizen by military tribunal simply by virtue of status as an "enemy combatant," this Court in *Quirin* need not have pointed to Congress' explicit authorization for the tribunal. Moreover, Respondents' argument that the authority to detain is necessarily subsumed within the authority to try a citizen by military tribunal ignores the difference between judicial process and none at all. As Alexander Hamilton stated long ago, it is "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten," not trial by military tribunal with access to counsel, that "is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." *The Federalist* No. 84 (Alexander Hamilton) (internal quotation and citation omitted).

Third, the historical record does not support unilateral executive authority to detain citizens as prisoners of war. In *Ex parte Milligan*, this Court firmly rejected the Executive's claim that it could detain Milligan, a citizen and resident of Indiana, although the government contended that he was a prisoner of war. 71 U.S. (4 Wall.) 2, 131 (1866). Lower courts faced with military detentions of citizens during the War of 1812 likewise rejected claims of executive power over citizens. *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

These cases cannot be distinguished as involving mere "*civilians*" as opposed to "*enemy combatants*." Resp. Br. 18 n.6. As this Court stated in *Quirin*, "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy . . . [is a] familiar example[ ] of [a] belligerent." 317 U.S. at 31. In *Smith*, the court rejected the detention of a citizen seized where U.S. forces were stationed and detained "under martial law, as a spy," because "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." 12 Johns. at 265, 266. Chancellor Kent in *Stacy* similarly rejected military jurisdiction over a citizen accused of "giving information to the enemy." 10 Johns. at 330 (reporter's notes). In both cases, the citizens detained by the military fell squarely within *Quirin*'s description of a belligerent. The distinction between *Quirin* and these cases is the existence of congressional authorization.[28]

[28] The detention of Confederate soldiers during the Civil War does not stand as an example of executive authority to detain citizens. Resp.

(Continued on following page)

Fourth, Respondents fail to establish the inapplicability of 18 U.S.C. § 4001(a). The plain language is patently clear, and therefore does not warrant resort to the legislative history to determine its meaning. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). The argument that the statute, passed at the height of the Vietnam War, does not mean what it says because it was enacted to repeal the Emergency Detention Act ("EDA") of 1950 makes little sense. The EDA's repeal was effected by the legislation that repealed it, not the statutory language of section 4001(a) that was passed alongside. Likewise, the canons of construction suggest that use of *dissimilar* language in other parts of section 4001 should not be read into subsection (a). *Cf. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998).

2. Respondents' principal argument in support of congressional authorization of Hamdi's detention is that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), includes the power to detain prisoners as a "quintessential and necessary

Br. 15. Congress both authorized the suppression of the rebellion, and suspended the writ of habeas corpus with respect to persons held as prisoners of war. *See An Act to provide for the suppression of rebellion*, 12 Stat. 281 (1861); *An Act relating to habeas corpus*, 12 Stat. 755 (1863). Because the Civil War necessarily involved citizens, congressional authorization for the use of force to suppress the insurrection was clearly directed at the citizens in rebellion. And if the Executive enjoyed inherent authority to detain citizens as prisoners of war, suspension of the writ with respect to such prisoners would have been unnecessary.

During World War II, the Ninth Circuit held that principles drawn from international law authorized the detention of a citizen who, unlike Hamdi, had received a full evidentiary hearing on whether he was in fact a prisoner of war. *In re Territo*, 156 F.2d 142 (9th Cir. 1946). But international law does not give the Executive any power that is not otherwise conferred on it by the Constitution or Congress.

aspect of the *use* of military force." Resp. Br. 20. This "blank check" theory has no basis in historical practice or precedent.

Respondents disregard the narrow construction of declarations of war by this Court in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814), and *Caldwell v. Parker*, 252 U.S. 376, 385 (1920). Nor do this Court's opinions addressing civil liberties in wartime give comfort to Respondents that a declaration of war constitutes sufficiently clear congressional authorization for the confinement of citizens. *See Ex parte Endo*, 323 U.S. 283, 300 (1944); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).[29] Even *Ex parte Quirin* suggests that a declaration of war does not by itself authorize detention. *See* 317 U.S. at 28-29. The Court there strongly emphasized the existence of congressional authorization, even though, as it stated, the trial of enemies who violate the laws of war is "incident to the conduct of war." *Id.* at 28.

The Fourth Circuit's opinion wrongly suggests that this case presents a choice between observing procedural niceties and granting the Executive the power to wage war effectively. Fortunately, the choice is far simpler. If the detention of citizens suspected of being "affiliated" with enemies is important to the conduct of war, Congress unquestionably could enact legislation, with sufficient constitutional safeguards, that would permit the Executive to detain such citizens in the interests of national security. Section 412 of the USA PATRIOT Act, 8 U.S.C.

[29] The detention challenged in *Endo* was by order of General De Witt, even if administered by a civilian agency. 323 U.S. at 289, 298. The civilian nature of the administering agency is a distinction that makes no difference. And *Endo*, like Hamdi's case, does not involve a challenge to a military tribunal. *Id.* at 297-98.

§ 1226a, and the now repealed Emergency Detention Act show that Congress knows how to authorize detention based on national security when it wants to. But Congress has not done so here. This Court should not grant unprecedented power to the Executive, and impose a limitation on the ability of Article III courts to give life to the Great Writ, simply because Congress has yet to permit the indefinite detention of citizens on the Executive's say-so.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender
FRANCES H. PRATT
Research and Writing Attorney

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

GEREMY C. KAMENS
Assistant Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioners

April 2004

(2)

03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,

Petitioners,

—v.—

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, TRIAL LAWYERS FOR PUBLIC JUSTICE, AND UNION FOR REFORM JUDAISM IN SUPPORT OF PETITIONERS

Jeffery Sinensky
Kara Stein
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, New York 10022
(212) 891-6742

Arthur Bryant
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza
Suite 275
Oakland, California 94612
(510) 622-8150

Steven R. Shapiro
(*Counsel of Record*)
Sharon M. McGowan
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2500

David Saperstein
UNION FOR REFORM JUDAISM
633 Third Avenue
New York, New York 10017-6778
(212) 650-4000

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Virginia (ACLU-VA) and the American Civil Liberties Union of South Carolina (ACLU-SC) are the ACLU's state affiliates in the jurisdictions where Petitioner has been detained throughout these proceedings. For more than eight decades, the ACLU has steadfastly adhered to the position that our nation's fundamental commitment to civil liberties is both most precious and most perilous in periods of national crisis. In support of that position, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The ACLU has also opposed arbitrary and indefinite detention as a violation of due process in many different contexts. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001). The proper resolution of the issues raised in this case is, therefore, a matter of critical importance to the ACLU and its members.

The American Jewish Committee (AJC), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are equally secure. Since the tragic events of September 11, 2001, AJC, like all Americans, has continued to seek the appropriate

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

balance between enhancing our national security and defending our constitutionally guaranteed civil liberties and principles of due process. AJC believes that striking the appropriate balance requires allowing an American citizen access to counsel and to the courts in order to challenge his designation and detention as an "enemy combatant."

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society. Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, our civil justice system, and the protection of the poor and powerless. TLPJ appears as *amicus curiae* in this case because it is committed to ensuring that the United States of America continues to provide – and stand throughout the world as a beacon for – access to justice.

The Union for Reform Judaism (URJ), the congregational arm of the Reform Jewish Movement, encompasses 1.5 million Reform Jews in 900 congregations nationwide. The American Jewish community long has cherished the freedoms guaranteed by the Constitution. Now as we strive, in this age of terrorism, to recalibrate the appropriate balance between our cherished, constitutionally protected freedoms and our national security, we turn to Jewish law for guidance, which affirms the spark of the divine in every individual and mandates the just treatment of all. Inspired by the principles of Jewish law, the Union opposes indefinite detentions without charges, and administrative rulings that deny citizens the constitutionally protected range of due process rights.

STATEMENT OF THE CASE

By the time the Court hears this case, Yaser Esam Hamdi, a United States citizen, will have been detained in a naval brig for two years. He has never been charged or tried for any offense and, until very recently, has been denied access to an attorney.

According to the government,[2] the events leading to Hamdi's detention are as follows. Hamdi went to Afghanistan at some point before September 11, 2001. He was still present in Afghanistan after the United States and coalition forces began military operations in that country in response to attacks by the Al Qaeda terrorist network on the World Trade Center and the Pentagon. The Northern Alliance, which was allied with the United States against Afghanistan's Taliban regime, captured Hamdi in Afghanistan in late 2001. The government maintains that Hamdi was "affiliated" with Taliban forces, for which he would fight "if necessary," and that, at the time of his capture, he was carrying a firearm that he turned over to Northern Alliance forces. (J.A. 148-150)

In Afghanistan, the Northern Alliance held Hamdi in two different prisons that it maintained. At the second, a U.S. interrogation team interviewed him. Thereafter, a U.S. military officer ordered his transfer to a U.S. detention facility in Kandahar. After another "military screening" in January 2002, Hamdi was taken to the Naval Base at Guantanamo Bay, Cuba. In April 2002, based on records demonstrating Hamdi's U.S. citizenship, the government removed him from Guantanamo Bay, separating him from other persons captured in Afghanistan, and transferred him to the Norfolk Naval Brig. In August 2003, the government

[2] As noted below, Hamdi's father filed a habeas petition as next friend to his son in which he disputes the government's version of the background events in this case.

apparently moved Hamdi to a naval brig in Charleston, South Carolina.

Hamdi's father, acting as next friend, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the detention of Hamdi by Secretary of Defense Donald Rumsfeld and Commander W.R. Paulette.[3] While not granting the writ, the district court instructed the government to allow counsel to have access to Hamdi. (J.A. 113-116) On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded to the district court for consideration of the "implications" of allowing Hamdi to meet with counsel, and an assessment of any arguments presented by the government in opposition to the petition for habeas relief. (J.A. 337-344) In particular, the court instructed the district court to consider a declaration that had been submitted by the government ("Mobbs Declaration"), which purported to set forth the justification for Hamdi's designation and detention as an "enemy combatant." (J.A. 342)

On remand, the district court determined that the government's declaration "standing alone" did not permit meaningful review of Hamdi's detention. (J.A. 282-299) In particular, the court was concerned about the fact that the declaration was not based on first-hand knowledge but rather relied upon hearsay from officials with the Northern Alliance, whom the court described as feudal "warlords." (J.A. 295) The court did not, however, require the government to allow Hamdi to meet with counsel based on its concerns; rather, it ordered the government to produce additional documentary evidence beyond the Mobbs Declaration. (J.A. 294)

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[3] An earlier habeas petition filed by the Federal Public Defender appointed to represent Hamdi was dismissed on the grounds that the attorney did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d 598, 603-07 (4th Cir. 2002).

The government again filed an interlocutory appeal, and the Fourth Circuit again reversed the district court. (J.A. 415-455) As a threshold proposition, the appeals court held that the President's constitutional powers as Commander-in-Chief gave him ample authority to detain Hamdi as an "enemy combatant" based on what it described as the "undisputed" premise "that Hamdi was captured in a zone of active combat in a foreign theater of conflict." (J.A. 417-418) While acknowledging that judicial review was appropriate, the court limited its inquiry to whether the government had "set[] forth factual assertions which would establish a legally valid basis for [Hamdi's] detention." (J.A. 453) Applying that standard, the court then concluded that the Mobbs Declaration was sufficient to justify Hamdi's ongoing detention. The court reached this conclusion notwithstanding the fact that the allegations contained in the Mobbs Declaration were based on hearsay statements whose reliability had never been tested, and that no court has ever had the opportunity to hear Hamdi's version of what transpired.

Hamdi's petition for rehearing en banc was denied with several dissents. (J.A. 458-533) Judge Luttig dissented from the denial of rehearing, noting that, until Hamdi is given a chance "to speak for himself or even through counsel," no facts about his case are "undisputed," let alone facts that could be viewed as dispositive of his petition. (J.A. 494) Judge Motz, joined by Judges King and Gregory, also dissented from the denial of rehearing. In addition to the reasons offered by Judge Luttig, Judge Motz noted that the extreme deference given by the court to the Executive's designation of a citizen as an "enemy combatant" threatened "to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms granted all citizens." (J.A. 517) As set forth in her opinion, Judge Motz could discern no basis in either the Constitution or any legal precedent for stripping a citizen of all constitutional

protections based solely on the government's untested accusation that he is an "enemy combatant." (J.A. 518)

SUMMARY OF THE ARGUMENT

This case raises the most fundamental issues that a court can be asked to decide. Acting through his Secretary of Defense, the President has asserted the unilateral right to imprison an American citizen without charges, without trial, without access to counsel except under terms and conditions that the Executive is free to dictate, and without the protection of international treaties ratified by the United States that are designed to protect even foreign soldiers captured in wartime.

The Executive, moreover, has claimed this unlimited authority for an unlimited time. In the government's view, Hamdi can remain imprisoned for the rest of his life if the Executive deems it expedient. Nor is that scenario far-fetched. The conflict in Afghanistan has been expressly linked to the broader "war" against terrorism, and we have repeatedly been told that the "war" against terrorism may never have a conclusive end. Much more than the liberty of a single detainee is therefore at stake.

1. Our system of laws does not entrust any one person, including the President, with such unbridled power to abridge individual liberty. When such abuses occur, habeas corpus is the appropriate remedy. The fact that the President has designated Hamdi an "enemy combatant" does not resolve these issues; it merely brings them into focus. In this battle over first principles, the Court need not resolve the difficult question of whether this country is now "at war" in a constitutionally meaningful sense. Even in wartime, the President's power is subject to limitations imposed by Congress and the Constitution. The Executive in this case has disregarded both.

2. Hamdi's continued imprisonment violates 18 U.S.C. § 4001, which prohibits the detention of American citizens without legislative approval. The Executive's argument that the Congressional resolution authorizing the use of force in Afghanistan also allows him unilaterally to designate citizens as "enemy combatants" and to detain them indefinitely both stretches the language of that resolution and ignores the clear statement rule that this Court has imposed as a necessary predicate to any claim by the Executive to curtail individual liberty.

3. Even if Hamdi's detention is not precluded by statute, he is entitled to a meaningful hearing to contest his designation by the government as an "enemy combatant." At a minimum, that means that he must be granted access to counsel and provided an opportunity to present his side of the story. He has still not received the latter, and the government's grudging concession that Hamdi may now meet with his lawyers in monitored sessions that the government can terminate when it chooses is both too little and too late. The right to counsel is not meaningful if it can be delayed until the hearing is over. And the right to a hearing is not meaningful if the government can prevail based on a showing of "some evidence" that is never subject to rebuttal. The writ of habeas corpus was developed to prevent arbitrary executive detention. Due process was enshrined in our constitutional scheme in order to forbid it.

4. If it is determined that Hamdi is not an "enemy combatant" after a constitutionally adequate hearing, he must either be released or remanded to the criminal justice system where the government can pursue any accusations of wrongdoing accompanied by all the traditional procedural safeguards.

5. On the other hand, if Hamdi is designated as an "enemy combatant" after a constitutionally adequate hearing, he must then be treated in accordance with international

protocols that the United States has ratified and that we properly rely on as a nation to protect our own captured soldiers. Specifically, the Geneva Convention requires that Hamdi be treated as a prisoner of war unless and until it is determined by a "competent tribunal" that he has forfeited that status by acting as an "unlawful combatant." So far, the government refuses to convene a competent tribunal and it refuses to treat Hamdi like a prisoner of war. The unique circumstances of this conflict may require even greater legal safeguards but, at a minimum, they do not permit the government to ignore the rudimentary legal procedures that it is committed by treaty to provide.

Thus, under any conception of Hamdi's status – wrongfully accused civilian or "enemy combatant" – his detention is illegal. He is therefore entitled to a writ of habeas corpus unless the government fulfills its legally binding obligations. Anything less would threaten both the integrity of our constitutional system and the rule of law.

ARGUMENT

I. OUR CONSTIUTION ENSURES THAT EXECUTIVE DETENTION IS SUBJECT TO THE RULE OF LAW

Since the Magna Carta was signed almost eight hundred years ago, Anglo-American law has viewed executive detention as contrary to a system of ordered liberty. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Jackson, J., dissenting) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land."). By expressly guaranteeing the availability of the historic writ of habeas corpus in the Constitution, the

Framers specifically sought to prevent arbitrary executive detention. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in result) ("the traditional Great Writ was largely a remedy against executive detention").[4]

As an historical matter, habeas corpus developed as a counter to the King's assertion of an "executive prerogative" to detain subjects without formal charges in alleged furtherance of the national interest. The issue came to a head in *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627), where five individuals (among hundreds similarly detained) unsuccessfully challenged their imprisonment for refusing to contribute to a forced loan that Charles I deemed critical to the defense of the kingdom, then at war with France and Spain. *See* Robert S. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 59 (1960). The King's attorney asserted that the imprisonment was "by the special command of his majesty," 3 How. St. Tr. at 3 – a power that the King deemed necessary for those "matter[s] of state" that were "not ripe nor timely" for the ordinary criminal process. *Id.* at 37; *see also* Walker, *supra*, at 67. The prisoners' lawyers warned that unless the Crown were required to provide a charge for which the prisoners could be tried, their imprisonment "shall not continue on for a time, but for ever," and all people "may be restrained of their liberties perpetually" without remedy. 3 How. St. Tr. at 8; *see also* Walker, *supra*, at 67.

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[4] The Framers' decision to charter a government of enumerated powers can also be viewed as a direct response to their experience with executive overreaching. *See* The Declaration of Independence, para. 2 (U.S. 1776) ("The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

Parliament responded to *Darnel's Case* with the Petition of Right, prohibiting imprisonment without due process and imposing restraints on the use of martial law. 3 Car. 1, c. 1 (1627) (Eng.). When the King continued detaining individuals on vague, ill-defined charges, Parliament enacted the Habeas Corpus Act of 1641, commanding jailors to provide a lawful basis for confinement and requiring courts to act promptly by discharging, bailing or remanding prisoners to custody for criminal trial. 16 Car. 1, c. 10, § 6 (Eng.) (court shall promptly "examine and determine whether the cause of such commitment be just and legall or not"). The 1641 Act also eliminated the notorious Star Chamber and restricted the jurisdiction of the King's Privy Council, long associated with arbitrary and executive imprisonment, secrecy and torture, particularly for suspected offenses against the State. *Id.* § 3, *see* John H. Langbein, *Torture and the Law of Proof* 90, 136 (1976). The Habeas Corpus Act of 1679 provided reinforcement by requiring that, in cases of commitment for any "criminal or *supposed criminal matters*," prisoners either be released or quickly brought to trial. 31 Car. 2, c.2 (Eng.) (emphasis added); *see also* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rights L. Rev. 555, 563 (2002).

Through these developments, the Great Writ ensured that detention absent formal charges would not be permitted. 9 Sir William Holdsworth, *A History of English Law* 118 (3d ed. 1944) (describing writ as "the most effective weapon yet devised for the protection of the liberty of the subject"); III William Blackstone, *Commentaries* *130 (habeas corpus is the "great and efficacious writ, in all manner of illegal confinement"); *see Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."); Zechariah Chafee, Jr., *The Most*

Important Human Right in the Constitution, 32 B.U. L. Rev. 144, 144 (1952).

This understanding of the writ as a vehicle to ensure due process informed the Framers when they crafted our Constitution and Bill of Rights. *See* Daniel J. Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* 24 (1966). Specifically, they believed that the writ of habeas corpus would provide "greater securities to liberty" than other provisions of the Constitution, because "the practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Hamilton).

Suspension of the writ was generally understood as the *only* way to detain an individual for wrongdoing without formally charging and trying him. Further demonstrating their intention to limit the executive's power to detain indefinitely, the Framers determined that only Congress could suspend the right to judicial review of executive detention, U.S. Const. art. I, § 9, cl. 2; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861), and only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2; *see* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (5th ed. 1891). By granting this power to Congress, as opposed to the President, the Framers ensured that no branch of government had the unilateral power to deprive a person of liberty. Moreover, by vesting this authority in Article I, the Framers ensured that this important decision would be made by the more representative and deliberative branch of government.

Even in the face of grave national emergencies, the Great Writ applies with full force. As one of England's leading constitutional scholars observed almost a century

ago, when contemplating the type of threats that we today label as terrorism:

> Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or imprisonment they would at once be brought before the High Court on a writ of *habeas corpus*, and unless some specific ground for their detention could be shown they would be forthwith set at liberty.

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 222 (7th ed. 1908) (footnote omitted).

The Framers also contemplated circumstances where grave national emergencies might justify the temporary abridgement of individual liberties. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (noting that the Constitution is not a "suicide pact"). In light of their experience with executive abuses, however, they deemed the legislature to be the branch best entrusted with the power to suspend the writ of habeas corpus. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring).

Notwithstanding the tragic events of September 11, 2001, Congress has not deemed it necessary to suspend the availability of habeas review in order to protect our national interests. Nor can any of its actions or authorizations be interpreted as implicitly suspending the writ. *St. Cyr*, 533

U.S. at 299 ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.") (citing *Ex parte Yerger*, 8 Wall. 85, 105 (1869)).

The Constitution's guarantee of habeas corpus promises more than just an empty proceeding. *See Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by the courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."). It ensures that the judiciary will provide an independent assessment of the legality of the detention and not merely rubber stamp the Executive's actions. *Cf. Estep v. United States*, 327 U.S. 114, 133-34 (1946) (Rutledge, J., concurring) (cautioning against making the judiciary "a rubber stamp in criminal cases for administrative or executive action"). Otherwise, the Constitution's guarantees of liberty and due process would be subject to the whims of men as opposed to the rule of law. *See Myers v. United States*, 272 U.S. 52, 292 (Brandeis, J., dissenting) ("Checks and balances were established in order that this should be 'a government of laws and not of men.'").

II. THE EXECUTIVE IN THIS CASE HAS NEITHER CONSTITUTIONAL NOR STATUTORY AUTHORITY TO DETAIN HAMDI INDEFINITELY

In addition to being a government of enumerated authority,[5] our system also reflects a separation of powers between three co-equal and coordinate branches of government. *INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers. . . ."). As Justice Brandeis noted, "[t]he doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power . . . and to save the people from autocracy." *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting). The Framers knew that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). *See also Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (noting that Framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws").

With regard to the allocation of powers among the various branches, "the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S. at 587. Under our constitutional system, only Congress has the authority to make the law. U.S. Const. art. I. The Executive, by contrast, "shall take care that [those] Laws be faithfully executed." U.S. Const. art. II, § 3; *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The lawmaking function belongs to

[5] *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (Black, J., plurality op.) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.").

Congress . . . and may not be conveyed to another branch or entity."). Even when issues of national security are at stake, "convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." *New York Times Co. v. United States*, 403 U.S. 713, 742-43 (1971). Unless the Executive can demonstrate that his actions have either been authorized by Congress or are part of the powers bestowed upon him by Article II of the Constitution, his actions are constitutionally proscribed. *See Youngstown*, 343 U.S. at 635-38.

Congress has spoken on the issue of executive detention and has explicitly denied the Executive branch the power it has tried to claim here. In recognition of the gross injustice suffered by Japanese-Americans interned during the Second World War, in 1971 Congress enacted the Non-Detention Act, which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This Act repealed the Emergency Detention Act of 1950, which gave the Attorney General the authority to detain people suspected of espionage or sabotage during periods of invasion, declared war or insurrection. As this Court explained, the "plain language of § 4001(a) proscribe[s] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The government insists that the Executive received an implicit grant of authority by Congress to detain indefinitely any American citizen designated as an "enemy combatant" when it passed the Authorization for Use of Military Force Joint Resolution on September 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution").[6]

[6] The Joint Resolution provides in relevant part that

The government further argues that a contrary interpretation would improperly impinge on the President's authority as Commander-in-Chief. Even assuming that the Joint Resolution permits the initial detention of United States citizens apprehended abroad in an active combat zone, the government's claim gives far too little weight to the serious concerns that led Congress to enact § 4001.

Hamdi has now been detained on American soil for almost two years. Whatever battlefield exigencies may have surrounded his initial detention no longer exist. Under these circumstances, the government's assertion that the Joint Resolution should be construed as a perpetual override of § 4001 conflicts with this Court's instruction that the judiciary "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers *intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.*" *Ex parte Endo*, 323 U.S. 283, 300 (1944) (emphasis added). *See also id.* at 303-04 (holding that Congress did not "clearly and unmistakably" authorize the indefinite detention of Japanese-American citizens when it enacted a statutory evacuation program); *cf. Kent v. Dulles*, 357 U.S. 116, 129 (1958) (noting that courts must "construe narrowly all delegated powers that curtail or dilute" a citizen's ability to take part in "activit[ies] included in constitutional protection").

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organization or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution § 2(a).

The government also suggests that 10 U.S.C. § 956(5) authorizes the indefinite detention of American citizens whom the Executive deems to be "enemy combatants." This provision, however, merely provides funding for "expenses incident to the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [Armed Services]," including those held "pursuant to Presidential proclamation." *Id.* When faced with a similar argument in *Ex parte Endo*, this Court rejected the idea that an appropriations bill could be construed as an affirmative grant of authority, insisting instead that "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." 323 U.S. at 303 n.24.

As Justice Jackson explained in *Youngstown*,

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only [by] disabling the Congress from acting upon the subject. *Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added). This is such a case. The Suspension Clause specifically prohibits the Executive from unilaterally detaining citizens without due process unless Congress deems such action necessary to cope with a national emergency. The Non-Detention Act further prevents the Executive from detaining citizens in the absence of express

legislative authority. Faced with such clear directives from the Constitution and the Congress, this Court cannot sanction the President's actions in this case without fundamentally undermining one of the bulwarks of our constitutional system, i.e., the separation of powers.[7]

III. HAMDI IS ENTITLED TO CONTEST HIS DESIGNATION AS AN "ENEMY COMBATANT" IN A PROCEEDING THAT COMPORTS WITH DUE PROCESS

The government claims that Hamdi was apprehended with Taliban forces on a battlefield in Afghanistan and that he surrendered a weapon. The government's mere assertion of these facts, in its view, is sufficient to designate Hamdi as an "enemy combatant." Hamdi, on the other hand, has never been given the opportunity to defend himself against the accusation that he was, in fact, fighting with the enemy. Thus, no court has ever heard Hamdi's version of the events leading up to his detention by American military forces. Due process requires that Hamdi be given a fair opportunity to contest his designation as an "enemy combatant."

The Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."). The Supreme Court has emphasized that "commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983). *See also*

[7] The relevance of § 4001 is discussed more fully both in other briefs and in the Second Circuit's decision in *Padilla v. Rumsfeld*, 352 F.3d 695, 718-22 (2d Cir. 2003).

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (emphasizing that freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). Even the government concedes that Hamdi is entitled to invoke these constitutional protections as an American citizen detained in this country under color of law.

Whenever the state deprives an individual of his liberty, due process entitles him at a bare minimum to notice of the charges against him and an opportunity to be heard in his defense. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process requires, "[a]t the very minimum," that a person being deprived of liberty "be given some kind of notice and afforded some kind of hearing"); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence.").[8]

Due process is not satisfied by the mere spectacle of a hearing where only the accuser can present his version of the facts. *See, e.g., Washington v. Texas*, 388 U.S. 14, 19 (1967) ("right to present the defendant's version of the facts as well as the prosecution's" is "a fundamental element of due process of law"). Rather, "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if

[8] These same principles also inform other protections contained in the Bill of Rights, such as the Confrontation Clause. U.S. Const. amend. VI. *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (requiring judicial hearing within 48 hours of warrantless arrest to prevent "prolonged detention based on incorrect or unfounded suspicion").

need be, by proof, however informal." *Londoner v. City and County of Denver*, 210 U.S. 373, 386 (1908).

During his two years of confinement, Hamdi has never had the opportunity to tell his side of the story. In fact, the government has physically restrained Hamdi from participating in the proceedings against him by holding him virtually incommunicado. Few more fundamental denials of due process can be imagined. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose *for himself* whether to appear or default, acquiesce or contest.") (emphasis added).

Compounding the problem, Hamdi was denied all access to counsel until very recently. Now that the Fourth Circuit proceedings have concluded, the government has finally allowed some contact between Hamdi and his lawyer, subject to government monitoring. The government also maintains that it can deny Hamdi access to counsel at any point in the future, if it deems such action necessary. This Court has never adopted such a cramped view of the right to counsel. "A necessary corollary [of the right to counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 10 (1954).

Notwithstanding the Executive's arguments to the contrary, Hamdi's right to counsel is not simply a matter of government largesse.[9] The right to counsel is directly related

[9] The government has carefully characterized its decision as "a matter of discretion and military policy," and continues to insist that "[s]uch access is not required by domestic or international law and should not be treated as precedent." Department of Defense, *DOD Announces Detainee Allowed Access to Lawyer*, Press Release, Dec. 2, 2003, available at 2003/nr20031202-0717.html.

to the Constitution's fundamental guarantee of due process. As this Court explained in *Powell v. Alabama*, 287 U.S. 45, 65 (1932), "where the defendant . . . is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process." *See also Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("The right to be heard would be, in may cases, of little avail if it did not comprehend the right to be heard by counsel.").

Although the government insists that Hamdi has no right to counsel because he is not facing criminal charges, the Constitution's fundamental guarantees of due process and access to counsel are more broadly triggered by deprivations of liberty, whether through criminal or civil means. In cases involving non-criminal deprivations of liberty, courts have recognized that a right to counsel is so critical to ensuring that the Constitution's guarantees of due process are satisfied that counsel is often appointed. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) ("A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.") (citing *Addington v. Texas*, 441 U.S. 418 (1979)); *see also Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality op.) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness).

Hamdi's request in this case is even more modest. He simply wishes to exercise his fundamental right to the assistance of counsel free from government interference. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges

between defendant and counsel because of the fear of being overheard."); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (noting that the total deprivation of the right to counsel is one of the few "constitutional errors" that is never "harmless").

Habeas corpus principles reinforce the notion that unrestricted access to counsel is indispensable to due process and fair play. The government cannot simultaneously acknowledge Hamdi's right to petition for habeas corpus and then undermine that right by denying him timely and unrestricted access to counsel. Incommunicado detention is inconsistent with modern habeas practice. *See* 28 U.S.C. § 2243 ("Unless the application for the writ and return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."); *see also Walker v. Johnston*, 312 U.S. 275, 285 (1941). It is also inconsistent with the Writ's historic foundations. *See, e.g.,* Habeas Corpus Act of 1641, 16 Car. 1, c. 10, § 6 (Eng.); 6 *Encyclopedia of the Laws of England* 130 (Renton ed. 1898); *see also* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 5 (Eng.) (imposing sanctions for failure to produce the prisoner). The government's continued refusal to produce Hamdi in person, itself problematic, only enhances the imperative of granting him uninhibited and unmonitored access to counsel. Indeed, in stark contrast to the government's current position, the right to counsel was apparently respected even when habeas corpus was purportedly suspended during the Civil War. *See* Habeas Petition quoted in *Ex parte Merryman*, 17 F. Cas. at 145 ("all access to [the prisoner was] denied except to his counsel and brother-in-law"). Hamdi's ongoing confinement is a reminder that time has not diminished the Writ's historic function nor vitiated the basic due process concerns that have historically guided its use.

In short, the traditional role of habeas corpus and the constitutional requirement of due process both demand that

Hamdi be given the opportunity to defend his liberty with the assistance of counsel. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha*, 504 U.S. at 79 (detainee is "entitled to constitutionally adequate procedures to establish the grounds for his confinement"); *United States v. Salerno*, 481 U.S. 739 (1987); *Addington v. Texas*, 441 U.S. 418 (1979). Just as due process is meaningless without Hamdi's participation, the denial of Hamdi's right to speak through counsel is tantamount in this case to a denial of his right to petition the court for habeas review.

Finally, due process demands that Hamdi's detention be supported by more than "some evidence."[10] The "some evidence" test is derived from administrative law where it functions as a standard of review, not a burden of proof. As such, it presupposes that there was an initial adversarial hearing at which a neutral arbiter made a preliminary determination on the merits. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 663-64 (1988). Here, of course, that is exactly what the government is trying to avoid. Invoking national security concerns, the government claims that a detainee has no right to challenge the evidence upon which his detention rests. The government does not even admit the possibility that its own evidence might either be false or unreliable or incomplete. Because such failures of proof are unlikely to be discovered without an adversarial process, a court applying the government's "some evidence" test – or, more generally, depriving the detainees of any opportunity to contest the basis for his detention – has no way of determining whether there is any credible evidence at all.

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[10] Although the Fourth Circuit claimed that it did not need to reach the question of whether the "some evidence" standard proposed by the government was the appropriate level of review (J.A. 449), it effectively did as much by denying Hamdi any opportunity to contest the evidence and then accepting the government's untested allegations as "undisputed." (J.A. 453)

Cf. Withrow v. Larkin, 421 U.S. 35, 58 (1975) ("Clearly, if an initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to an ultimate decision, a substantial due process question would be raised.").

Contrary to the government's approach, the label "enemy combatant" does not have a talismanic significance that overrides all procedural safeguards.[11] It is not inconceivable that the government has made a mistake.[12] Facing a possible lifetime in prison, Hamdi must be given the opportunity to demonstrate that the government's charges against him are unwarranted.[13] A test that does not even

[11] Although the government borrows the term "enemy combatant" from this Court's opinion in *Ex parte Quirin*, 317 U.S. 1 (1942), the Court in that case was clearly talking about *unlawful combatants* who had violated the rules of war and had been convicted on that basis by a military tribunal. *See also* Stephen I. Vladeck, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 170 n.92 (2004) (noting that the *Quirin* Court's "coinage of the term 'enemy combatant' may have been entirely accidental, since, from the plain language of the opinion, the term only meant to distinguish enemy members of the armed forces from enemy spies or allies"). As used by the government, however, the term "enemy combatant" seems designed to obscure the important differences between lawful and unlawful combatants. *See infra* Section V.

[12] *See, e.g.*, Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and [$]20,000 for a[n al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

[13] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), provides no authority to the contrary. Because that case involved foreign soldiers fighting for a declared enemy who were captured and detained abroad, this Court ultimately held due process did not apply and that the American courts lacked jurisdiction to entertain their claim. Hamdi, on the other hand, is an American citizen detained on American soil. As a result, jurisdiction is not disputed and Hamdi is plainly entitled to invoke the protections of the Due Process Clause. Even in *Eisentrager*, moreover, the Court recognized its duty "to ascertain the existence of a state of war and

claim to consider whether the government's evidence is fabricated or flimsy or less than the whole story cannot possibly function as an adequate constitutional safeguard against arbitrary detention. (J.A. 524-525) At a minimum, the government must present clear and convincing evidence to justify Hamdi's ongoing detention, even if its purpose for doing so is ostensibly non-punitive.[14] *See Addington*, 441 U.S. at 427; *see also Foucha*, 504 U.S. at 86; *Salerno*, 481 U.S. at 751; *cf. Hendricks*, 521 U.S. at 353 (statute required trial to be held to determine that person was a sexually violent predator "beyond a reasonable doubt").

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble. . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Even during times of war, the Executive must respect the boundaries on its authority established by the Constitution. *See, e.g., Youngstown*, 343 U.S. 579 (1952); *Ex parte Endo*, 323 U.S. at 283; *Raymond v. Thomas*, 91 U.S. 712 (1875); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Merryman*, 17 F. Cas. at 144. This Court should learn from the mistakes of the past, *see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944), and refuse to put its imprimatur on the Executive's efforts to undermine fundamental constitutional guarantees of due process and the rule of law.

whether [a petitioner] [is] an alien enemy." *Id.* at 775. Furthermore, the Court reached this conclusion only after a full trial before a military tribunal, during which the petitioners were represented by counsel. *Id.*

[14] *Amici* AJC and URJ have not taken a position on the precise standard of judicial review that should apply under these circumstances, but they fully agree that such review must entail a meaningful examination of the assertions underlying the designation and detention of Hamdi as an "enemy combatant," and that the "some evidence" standard proposed by the government is not the appropriate test.

IV. IF THE GOVERNMENT CANNOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT HAMDI IS AN "ENEMY COMBATANT," IT MUST EITHER TRANSFER HIM TO THE CRIMINAL JUSTICE SYSTEM OR RELEASE HIM

If, after a constitutionally adequate hearing, the government is unable to prove that Hamdi was an "enemy combatant," then the reasons that it currently offers for Hamdi's ongoing detention – i.e., preventing him from rejoining the enemy or facilitating the gathering of enemy intelligence – lose all credibility. The only legitimate basis for keeping Hamdi in custody would be an accusation of criminal wrongdoing. At that point, the government must either initiate criminal proceedings against Hamdi, with all of the concomitant constitutional protections, or release him.

In light of their extensive efforts to limit executive detention, *see supra* Section I, the Framers certainly never contemplated that the government could avoid triggering the protections in the Bill of Rights by simply detaining a citizen indefinitely without ever charging him with a crime. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (noting that the Constitution's guarantee of a speedy trial "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges"). Even when there are legitimate reasons why a criminal prosecution cannot proceed, the Supreme Court has firmly instructed that persons cannot be held indefinitely. If a defendant is determined to be incompetent to stand trial, for example, the government cannot merely detain the defendant merely by asserting public safety concerns. Rather, it must initiate civil commitment proceedings – at

which the prisoner is entitled to counsel – and demonstrate by clear and convincing evidence that the person is a threat either to himself or to others. *Addington*, 441 U.S. at 426-27; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

If the government's justification for Hamdi's ongoing confinement ultimately rests on an accusation of criminal wrongdoing, then the government must prove those allegations beyond a reasonable doubt through the criminal process. *See In re Winship*, 397 U.S. 358 (1970); *cf. Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

V. EVEN IF DOMESTIC LAW AND THE FACTS OF THIS CASE SUPPORT THE EXECUTIVE'S DESIGNATION OF HAMDI AS AN "ENEMY COMBATANT," HIS ONGOING DETENTION VIOLATES THIS COUNTRY'S BINDING TREATY OBLIGATIONS

Assuming that the Executive's actions can be reconciled with the Non-Detention Act and are consistent with the Constitution, Hamdi is still entitled to challenge his confinement by invoking rights and protections grounded in international law and treaty obligations.

On February 2, 1956, the United States ratified the Geneva Convention Relative to the Treatment of Prisoners of War. *See* 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140. Article 5 of the Convention requires all signatories to treat all lawful combatants in the course of armed conflict as prisoners of war ("POWs") "from the time they fall into the power of the enemy and until their final release and repatriation." *Id.* at art. 5. If there is any doubt as to whether a captured individual should be classified as a lawful or an unlawful combatant, the Convention provides that "such

persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* Article 7 of the Geneva Convention specifies that prisoners of war "may in no circumstances renounce in part or in entirety the rights secured to them" by the treaty. *Id.* at art. 7.

The Supremacy Clause makes clear that "all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2. Likewise, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made under [the United States'] authority." U.S. Const. art. III, § 2, cl. 1. In other words, these treaty obligations have the full effect of law in this country. Consequently, before the United States can strip a captured enemy solider of the protections of the Geneva Convention, it must bring the combatant before a competent tribunal for an adjudication of his proper status.

In this case, however, the Executive has never presented Hamdi to a competent tribunal for any determination of whether he was even a combatant, and if he was, whether he can be denied the protections granted to prisoners of war because he was an unlawful combatant. The government has unapologetically stated that it has no intention of complying with the Geneva Convention's requirement that Hamdi be presented to a tribunal, and has unilaterally determined that he is an "enemy combatant" who is not entitled to the protections afforded to a prisoner of war.[15]

The federal habeas corpus statute authorizes courts to grant a writ of habeas corpus whenever a person can demonstrate that his "custody [is] in violation of the . . .

[15] *See, e.g.*, Government's Br. in Opp. 29.

treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3).[16] This means that, even assuming that the government can demonstrate that its actions are consistent with the constitutional and statutory provisions that would normally protect citizens from indefinite executive detention, the government's failure to comply with its international treaty obligations provides an independent basis for granting Hamdi's petition for writ of habeas corpus.[17] At a minimum, this Court should direct the Executive to afford Hamdi all of the protections to which POWs are entitled until he has received a hearing before a competent tribunal to determine his status.

[16] *Cf. Breard v. Greene*, 523 U.S. 371 (1998) (considering, but ultimately rejecting as waived, petitioner's claim that his detention violated the Vienna Convention).

[17] This issue is addressed more fully in other *amicus* briefs.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully Submitted,

Jeffrey Sinensky
Kara Stein
The American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 891-6742

Steven R. Shapiro
(Counsel of Record)
Sharon M. McGowan
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Arthur Bryant
Trial Lawyers for Public Justice
One Kaiser Plaza
Suite 275
Oakland, CA 94612
(510) 622-8150

David Saperstein
Union for Reform Judaism
633 Third Avenue
New York, NY 10017-6778
(212) 650-4000

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No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DENNIS W. ARCHER,
PRESIDENT*
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5000
BARRY SULLIVAN
SHELLEY MALINOWSKI
ROBERT L. SCHULTZ
ERINN L. WEHRMAN
COUNSEL FOR AMICUS CURIAE

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The ABA is the leading national membership organization of the legal profession. The ABA's membership, which comprises more than 400,000 attorneys from all 50 states, includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.

The ABA's mission is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence, and respect for the law." Among the ABA's goals is "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." The ABA also seeks "[t]o increase public understanding of and respect for the law, the legal

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

process, and the role of the legal professional," and "[t]o advance the rule of law in the world."

The ABA long has recognized that the protection of individual liberty, the pursuit of justice, and the advancement of the rule of law in the world require that citizens have meaningful access to counsel and the courts. Accordingly, the protection of such access is a core ABA concern. The ABA has adopted numerous policies that address the critical importance of access to counsel in a wide range of civil, criminal, and immigration proceedings, as well as policies and standards governing the responsibilities of lawyers to protect the integrity and effectiveness of the attorney-client relationship and the attorney-client privilege, and to safeguard client confidences.[2]

In March 2002, the ABA created a Task Force on the Treatment of Enemy Combatants to examine the challenging and complex questions of statutory, constitutional, and international law and policy raised by the government's detention of U. S. citizens declared to be "enemy combatants."

In February 2003, the ABA House of Delegates adopted a policy, based on the work of the Task Force, that:

[2] The ABA adopts policies through the official actions of the House of Delegates, which consists of more than 500 delegates, who represent various entities within the ABA, as well as the legal profession as a whole. Reports recommending the adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations, and individual ABA members. Those that are passed by the House become the official policies of the ABA. ABA policies relevant to this case, as well as Task Force Report, are reproduced in the Appendix.

> urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security.

The policy further urges that such detainees

> not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainee and the requirements of national security.

The issues presented in this case concern the core of that policy and the heart of the ABA's overall mission and goals. These issues go directly to the essential role of the courts in protecting individual rights, and to the advocate's critical role, not only of providing counsel to the individual whose liberty is at stake, but of assisting the court by making the kind of presentation concerning the relevant facts and law that only a trained advocate can provide. The ABA therefore has a critical interest in ensuring that these issues are resolved in a way that gives proper weight to legitimate concerns of national security, but also protects the values of individual liberty, fairness, and equal justice under law.

SUMMARY OF ARGUMENT

As this Court has recognized, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). Thus, as our nation continues its fight against terrorism, the ABA is committed to safeguarding the procedural requirements for protecting individual liberties set forth in our Constitution, and to preserving the essential role of those in the legal profession, advocates as well as judges, in protecting these liberties.

In this case, the government contends that once the executive has designated an American citizen as an "enemy combatant," he may be detained without charge, and without access to counsel, for whatever the duration may be of the ongoing global war on terror, now in its third year. The government further argues that the courts may conduct only the most limited review of a detention; more particularly, the courts must accept the government's assertions at face value and may not inquire at all into the alleged evidence upon which such assertions are based.

If the government's position were adopted by this Court, a U. S. citizen who is falsely or inaccurately accused could be detained indefinitely, without effective access to counsel to test the basis for his detention in a *habeas corpus* proceeding or, indeed, in any judicial proceeding. Such power is fundamentally incompatible with the constitutional guarantee of due process, with the role constitutionally assigned to the courts in the protection of individual rights, and with the rule of law itself.

Unlike a *habeas* petitioner who has been convicted of a crime after a criminal trial with all its procedural protections, Hamdi has not previously been afforded any meaningful opportunity to test the government's claims. Hamdi's *habeas* proceeding is his first and only such opportunity. At the very least, Hamdi, like all other citizens detained by the government, must be afforded a meaningful opportunity to challenge the basis for his detention before an independent judicial officer; he must have meaningful access to counsel to assist him in making that challenge; and the government must substantiate the basis for its detention under a meaningful standard of review.

ARGUMENT

I. It Is The Role Of The Federal Courts To Provide Meaningful Review When U. S. Citizens Are Detained Indefinitely.

A. The Federal Courts Are Charged With Protecting The Individual Liberties Of U. S. Citizens Under The Constitution Even In Times Of Hostilities.

The framers of the Constitution specifically recognized both the importance of an independent judiciary and its critical role in protecting the individual liberties of citizens from unconstitutional encroachments by the other branches of government: "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (Black, J.) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)); *see also Reid v. Covert*, 354 U.S. 1, 23-30 (1957) (explaining the founders' fear of unbridled executive control and their intent to establish an independent judiciary to protect individual rights).

The framers intended that citizens be deprived of liberty only after a meaningful judicial proceeding, and never as a matter of executive fiat. *See The Federalist Nos. 83, 84* (Alexander Hamilton). For this reason, the framers specifically provided for the continued availability of the writ of *habeas corpus*, which empowers the judiciary to free those wrongly held by the executive. U.S. Const. art. I, § 9, cl. 2. Indeed, Hamilton recognized this fact when he called the Great Writ ". . . perhaps [a] greater securit[y] to liberty and republicanism than any [the Constitution] contains." *The Federalist No. 84* (Alexander Hamilton).

This Court has made the same point, recognizing that *habeas corpus* actions "are of fundamental importance in our constitutional scheme because they directly protect our most valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (internal quotations and alterations omitted), *overruled in part on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996).

Throughout our nation's history, of course, the federal courts have recognized the need to afford substantial deference to the executive with respect to actions taken pursuant to the executive's constitutional responsibility to provide for the national defense. *See Johnson v. Eisentrager*, 339 U.S. 763, 774-79 (1950) (noting deference to the executive and denying *habeas corpus* relief to enemy aliens captured, convicted, and detained outside the United States). Although such deference may be necessary in times of crisis, it cannot be absolute, and it has not been allowed to displace the judiciary's essential obligation to provide American citizens with meaningful review of executive detentions. *See Ex parte Endo*, 323 U.S. 283, 298-99 (1944) (reversing, after full review of the factual record, district court's denial of *habeas* petition filed by U. S. citizen who

was detained in an internment camp under military orders). Indeed, when significant constitutional interests are at stake, this Court has recognized that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Robel*, 389 U.S. at 263-64 (holding that the statute passed pursuant to Congress's war powers was nonetheless an unconstitutional abridgement of the petitioner's right of association under the First Amendment) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).[3]

Even in cases involving only a temporary deprivation of property during wartime, this Court has insisted upon the need for meaningful review of the executive's justifications for its actions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-89 (1952) (reviewing the relevant evidence before determining that the executive lacked the authority to deprive the plaintiffs of their property); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133-34 (1851) (inquiring into whether the executive legally executed the

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[3] When the government exercises its power in such a way that it "clashes" with an individual's liberty, the judiciary must "determine whether "the resulting restriction on freedom can be tolerated." *Robel*, 389 U.S. at 264; *see also Covert*, 354 U.S. at 14 ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."); *Ex parte Quirin*, 317 U.S. at 19 (emphasizing the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty").

taking of private property to prevent it from falling into enemy hands).[4]

When the deprivation involves a citizen's loss of liberty, it is even more critical that the deference properly afforded to the executive should not displace such review. This principle was established in the earliest days of this nation, *see, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807),[5] and has been repeatedly reaffirmed by this Court. *See e.g., Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("there is no higher duty than to maintain [the writ of *habeas corpus*] unimpaired."); *Ex Parte Hull*, 312 U.S. 546, 549 (1941)

[4] *See also Blaisdell*, 290 U.S. 398. The Court emphasized in *Blaisdell* that "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which *have always been, and always will be, the subject of close examination under our constitutional system*." *Id.* at 425-26 (emphasis added).

[5] *See also Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, an American citizen was detained by the executive and tried by a military commission on charges of conspiracy against the government, affording aid to rebels, inciting insurrection, disloyal practices, and violation of the laws of war. *Id.* at 6, 107. The detainee sought a writ of *habeas corpus* seeking a discharge from his unlawful detention. *Id.* at 107. The Court reviewed the facts of the case to determine whether the detention was lawful. *Id.* at 118. In determining the detention unlawful, the Court emphasized that "if society is disturbed by civil commotion – if the passions of men are aroused and the restraints of law weakened, if not disregarded – these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws." *Id.* at 124.

("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of *habeas corpus*."). For example, in *Ex parte Bollman*, two American citizens were charged with treason and detained by the executive. This Court did not simply defer to the government's representations, but independently examined all the evidence upon which the charges were grounded and concluded that the evidence was insufficient to support the detention. *Id.* at 135. The Court warned that it would be "extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the [executive] might select, and to which he might direct them to be carried." *Id.* at 136.

Unless the right to *habeas corpus* has been suspended by Congress, the judiciary is charged, even in times of hostilities, with protecting individual liberty interests by reviewing the basis of an executive detention. In this case, the Great Writ has not been suspended. It is therefore imperative, at the risk otherwise of rendering the writ meaningless, that the judiciary be able to conduct a meaningful review of the legality of Hamdi's detention.

B. The Federal Courts Are Charged With Conducting Meaningful Judicial Review Of The Designation And Detention Of U. S. Citizens As "Enemy Combatants."

This case involves the indefinite detention of an American citizen based upon his designation by military authorities as an "enemy combatant," but this phrase is not a term of art that has any recognized meaning in federal or international law. *See* American Bar Association Task Force on Treatment of Enemy Combatants, *Recommendation, Report* 109, *infra* at 7a-9a. Indeed, the government appears

to have adopted the term from a single, offhand reference in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), a case involving "unlawful combatants."[6] As the Court recognized in *Ex parte Quirin*, the law of war traditionally has divided those captured in wartime into two categories – "lawful combatants" and "unlawful combatants." *Id.* Each group has distinct, but well-established, substantive and procedural rights.[7] According to the government, however, "enemy combatants" are entitled to no procedures at all; they can be seized in any "zone of active combat" and held in jail for the "duration of the hostilities."[8]

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[6] In *Ex parte Quirin*, 317 U.S. at 31, the Court described an individual properly designated as an "unlawful combatant" as "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." Under the law of war, "lawful combatants" are soldiers who fight openly for one side and who are entitled, when captured, to the status of prisoners of war. *Id.* at 27-36. "Unlawful combatants," by contrast, are typically spies without uniforms who are ineligible for prisoner of war status. *Id.* at 31. In *Ex parte Quirin*, the Court used the term "enemy combatant" as a synonym for "unlawful combatant," but not as a separately recognized designation.

[7] The distinction is carried forward, using somewhat different terms, in the Geneva Convention Relative to the Treatment of Prisoners of War, and the United States military regulations implementing the Geneva Convention. *See* Geneva Convention Relative to the Treatment of Prisoners of War, arts. IV-V, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees Reg. 1-6(b), Glossary "Other Detainee" (Oct. 1, 1997).

[8] Nor is the term limited to those captured in a zone of combat. Jose Padilla, who was also designated an "enemy combatant," and is also being held indefinitely, was arrested at O'Hare International Airport in Chicago. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted* (Feb. 20, 2004) (No. 03-1027).

In this case, the district court concluded that it could not conduct a meaningful judicial review of Hamdi's *habeas* petition without knowing the basis for the "enemy combatant" designation applied to Hamdi, and without having access to Hamdi's alleged statements,[9] upon which the government relied in applying the designation to Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535-36 (E.D. Va. 2002). In holding that the trial court could not require the government to disclose either the legal or the factual basis for the "enemy combatant" designation, the Fourth Circuit gave insufficient attention to the obligation of the courts, under the Constitution and laws, to conduct meaningful reviews of governmental detentions of U. S. citizens. *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003).

The Fourth Circuit's analysis is inconsistent with principles articulated by this Court in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). In that early Cold War case, this Court declined to uphold the Attorney General's *ex parte* designation of "subversive" organizations. *Id.* at 124-25, 142, 174-76. The Attorney General, without notice or hearing, and solely on the basis of alleged evidence held in secret, designated three organizations as Communist on blacklists used by the loyalty review board that regulated access to government

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[9] Hamdi's statements were purportedly paraphrased in the Declaration of Michael H. Mobbs, a "Special Adviser to the Undersecretary of Defense for Policy." (Mobbs Declaration, ¶¶ 5, 9.) This two-page declaration, the government's only evidence of the grounds for Hamdi's designation as an "enemy combatant," was prepared by an individual with no personal knowledge of any statements made by Hamdi, of the circumstances of his capture or detention, or of his designation by military authorities as an "enemy combatant." *Hamdi*, 243 F. Supp. 2d at 533-36.

employment. *Id.* Justices Black and Frankfurter both noted that the blacklisting had grave consequences beyond employment ineligibility. *Id.* at 142 (Black, J., concurring); *id.* at 161 (Frankfurter, J., concurring). Justice Douglas found the rules to be so poorly defined as to render them unreviewable. *Id.* at 176 (Douglas, J., concurring). Without a clear standard, the law was not constitutional and could not constitutionally be enforced, even assuming the utmost good faith on the part of those charged with its administrative enforcement. *Id.* at 176-77. As Justice Douglas wrote, echoing Chief Justice Marshall's statement in *Marbury v. Madison*: "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws*, not of *men*." *Id.* at 177 (emphasis in original); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

In the case at bar, neither Congress, the executive, nor anyone else has defined the term, "enemy combatant," and there is no guidance available to those who must apply it. As this Court recognized in *Joint Anti-Fascist Refugee Comm.*, the Constitution requires clarity of law, not simply the expectation of good faith in its enforcement.

II. Fundamental Due Process Requires That U. S. Citizens Indefinitely Detained By The Government Have Access To Counsel And The Opportunity To Challenge The Allegations Against Them.

The judiciary's constitutionally mandated role to provide meaningful review of individual deprivations of liberty is critically important, but is not, in and of itself, sufficient to ensure the safeguarding of liberty that the Constitution requires. The defense of liberty also requires that citizens facing the possibility of serious deprivations have the right to retain counsel and contest the allegations against them. Holding a citizen indefinitely as an "enemy combatant" without access to counsel or the right to challenge the allegations against him violates fundamental due process under the Constitution, as well as the dictates of the constitutionally-informed federal *habeas corpus* statutes, 28 U.S.C. § 2243 and § 2246. These statutes grant petitioners the right to appear in court to deny under oath any factual allegations made against them, to offer evidence of material facts, and to receive a judicial determination of the factual issues raised in their petitions.

The precise requirements of due process depend in any case upon the circumstances; they are not susceptible to mechanical application. Nonetheless, in determining the amount and timing of the process that is due in any particular circumstance, this Court often has found useful the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

If the *Mathews* test were applied here, a citizen subject to indefinite detention by the government would have the opportunity to challenge his detention before an impartial judicial officer, to have representation by counsel, and to have the opportunity to consult with counsel in the preparation of his case.

A. U. S. Citizens Deprived Of Their Liberty Are Entitled To Contest The Bases For Their Detention.

Having labeled Hamdi an "enemy combatant" without notice or a meaningful opportunity to be heard, the government now asserts that Hamdi has no rights to contest his status as an "enemy combatant," or his continued detention, because, as an "enemy combatant," he has no right to notice or a meaningful opportunity to be heard. This argument is both circular and unprecedented. Indeed, the case most analogous to the case at bar is *In re Territo*, which involved an American citizen who was arrested on the battlefield in enemy uniform during the Second World War, and was nevertheless afforded a full evidentiary hearing to review the factual basis for his detention. *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

As Justice Frankfurter recognized in *Joint Anti-Fascist Refugee Comm.*, secret determinations by the executive are fundamentally inconsistent with the core meaning of due process and the rule of law in a democratic society:

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

341 U.S. at 170 (Frankfurter, J., concurring); *see also National Council of Resistance of Iran v. United States Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). As Justice Frankfurter further noted, the Constitution provides, at a minimum, for the procedural right to a judicial hearing of such a determination, including the opportunity to see the

evidence, at least insofar as the circumstances will allow, and, equally important, the right to counsel. Justice Douglas, who also concurred in *Joint Anti-Fascist Refugee Comm.*, emphasized that the Constitution provides for rights that are essentially procedural because it is "procedure that spells much of the difference between rule by law and rule by whim or caprice." 341 U.S. at 179 (Douglas, J., concurring).

B. To Challenge The Government's Allegations Effectively, A U. S. Citizen Deprived Of His Liberty Must Have Access To Counsel, Which Requires That He Be Allowed To Communicate With Counsel And Inform Counsel Of The Facts Of The Case So That Counsel Can Adequately Represent Him.

In other circumstances in which the government has sought to deprive a citizen of his liberty, this Court has recognized that the fundamental fairness required by the Due Process Clause requires access to counsel. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981). In fact, because the liberty interest in freedom from physical restraint is so strong, this Court has written that an indigent litigant facing loss of liberty in even a non-criminal proceeding is presumed to have the right to *appointed* counsel. *Id.* Notably, this right derives from the liberty interest itself,[10] not from the Sixth Amendment right to counsel. *Id.*; *cf. Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality).

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[10] This Court has also recognized a fundamental right of access to courts when liberty interests require it. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374-75 (1971) (finding that a state could not restrict access to the courts for the purposes of dissolving a marriage because of the marriage relationship's status in "society's hierarchy of values").

The due process requirement that a party be allowed to speak through retained counsel where he faces a serious deprivation of liberty rests on the recognition, as this Court has noted, that most laypersons will not have the expertise necessary to represent themselves in complex matters. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("If, in any case, *civil or criminal*, a . . . court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and . . . due process in the constitutional sense.") (emphasis added). Moreover, without being allowed access to an attorney, Hamdi has effectively been denied the opportunity to be heard in an adversarial proceeding, since only a trained attorney, armed with facts that only his client can provide, has the knowledge and skill to test the government's case effectively by cross-examining its witnesses, rebutting its evidence, and testing its legal theories. *Id.* at 69 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.").

In Hamdi's case, where the deprivation of liberty is complete, ongoing, potentially without end, and based entirely upon a secret record, the need for counsel could not be more compelling. Without counsel, the risk of error is enormous; there is little likelihood, for example, that Hamdi would have been able to understand his rights sufficiently to represent himself, when he was not been permitted to speak to anyone during the first two years of his incarceration.

It may be objected that Hamdi actually has a lawyer. But the fact is that Hamdi was not allowed to communicate

with his lawyer in any way from the time of the lawyer's appointment until early February 2004.[11] Hamdi's lawyer was required to prepare the petition for a writ of *habeas corpus* without the benefit of Hamdi's factual knowledge, or of any other comment or direction from him. Counsel was then required to litigate the case in the district court, back and forth to the Fourth Circuit, and, finally, through the granting of *certiorari* by this Court, all without the benefit of Hamdi's knowledge, input, or direction. Thus, at all the relevant and critical stages, Hamdi has been denied the communications with his counsel upon which effective representation depends. This lack of access violates the most fundamental requirements of a lawyer-client relationship. Model Rules of Prof'l Conduct R. 1.1 cmt. 5, 1.2(a), 1.4 (2003).[12]

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[11] Even though the government provided Hamdi with limited access to his lawyer earlier this month, it did so only subject to the most extreme limitations, and specifically stated that it did so as a matter of grace, rather than right. *See* Reuters, *U.S. Citizen Caught in Afghanistan Gets Lawyer Visit*, (Feb. 3, 2004), http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=4274656. But the *right* to counsel cannot be made to depend on the whim of government officials. In addition, the government specifically reserved the right to refuse detainees such access to counsel in similar cases in the future. *See* U. S. Dep't of Defense, News Release, dated December 2, 2003, http://www.defenselink.mil/releases/2003/nr20031202-0717.html. Finally, access to counsel was permitted in this case only after the petition for *certiorari* had been granted. The need for meaningful access to counsel occurred long before that time – when the *habeas* petition was being prepared, and when the case was being litigated in the district court, not when the record was frozen and the legal arguments had been shaped.

[12] As stated in the Preamble to the Model Rules, "A lawyer, as a member of the legal profession, is a representative of clients, an officer

At this stage, when *certiorari* already has been granted, the government has finally allowed Hamdi to meet his lawyer, but only in the most heavily monitored circumstances, and long after the factual record was frozen and the legal arguments decided upon. Even now, the government denies that Hamdi has any *right* to consult a lawyer, but purports to allow him access to his lawyer as a matter of grace that may be withdrawn at any time, and one that need never be afforded to anyone else.

The restrictions the government has placed on counsel representing individuals who have been designated as "enemy combatants" are fundamentally incompatible with the standards set forth in the ABA's Model Rules of Professional Conduct. The standards established in the Model Rules simply cannot be satisfied without permitting attorneys to communicate with their clients. For example, Rule 1.2(a) provides that, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." *Id.* R. 1.2(a). Similarly, Rule 1.4 requires that "A lawyer shall . . . keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information," and that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* R. 1.4. Under the Rules, lawyers practicing in this country have long-established professional duties to abide by their clients' decisions concerning the

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of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* pmbl.

goals of the representation, to keep their clients apprised of the status of the matter so that the clients can make informed decisions regarding the representation, and to abide by those decisions. These duties cannot be satisfied if counsel are not permitted to communicate on a reasonably frequent basis with their clients.

Nor can attorneys satisfy their professional duty of providing independent, candid advice to their clients when no communications are permitted between attorneys and their clients. Rule 2.1 provides that, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* R. 2.1.

Finally, the fundamental basis for the rules of professional responsibility relating to the attorney-client privilege and confidentiality, Rule 1.6, which the ABA has taken special care to preserve and enforce, is the premise that effective representation is impossible unless counsel is able to engage in direct, open and forthright communications with the client regarding the facts and circumstances of his case.

Such limitations on the ability of lawyers to communicate with their clients also violate constitutional requirements. In *Geders v. United States*, 425 U.S. 80 (1976), this Court recognized that far less onerous limitations on the attorney-client relationship were constitutionally impermissible. In *Geders*, a criminal defendant was on the stand for his direct examination, and it happened that his cross-examination had not begun by the end of the day. *Id.* at 88. The trial judge ordered him sequestered overnight without access to counsel, to prevent coaching. *Id.* at 82-86. This Court held that even this short sequestration was a

denial of the constitutional right to counsel, because there were many legitimate and pressing reasons for the lawyer to talk with his client, and many less restrictive ways to prevent coaching. *Id.* at 88-91. Under *Geders*, any restrictions on communications with lawyers must therefore be narrowly tailored to address the problems they seek to regulate. *See also Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (stating that a defendant must be able to communicate with his attorney to supply necessary information and contribute to decisions regarding his defense). Unlike *Geders*, the restriction here has been long, total, and complete.

A hearing cannot satisfy constitutional requirements when there is no opportunity to consult freely with counsel, to know the reasons on which the government purports to act, to challenge those reasons, or to answer the claims asserted against one.

C. A Citizen's Rights To Appear Before The Court, To Contest The Allegations Against Him, And To Obtain A Judicial Determination Of The Facts Also Are Guaranteed Under Federal *Habeas* Statutes.

The federal *habeas corpus* statutes grant Hamdi, like any other person held by the government, the right to present his side of the story before the court. Among other things, Section 2243 provides that the court hearing a petition that raises issues of fact "shall summarily hear and determine the facts" and permit the detainee "under oath [to] deny any of the facts set forth in the return or allege any other material

facts." 28 U.S.C. § 2243.[13] Section 2246 also provides for discovery, either orally or by affidavit or deposition.[14] Yet Hamdi was not permitted to write his own petition, or, for all the record shows, to learn the contents of the petition that was filed on his behalf. In addition, although the right to an evidentiary hearing in a *habeas* case is mandatory when the petition raises dispositive factual issues never before addressed in any kind of adjudication (*see generally Developments in the Law – Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1113 (1970)),[15] Hamdi has been denied any opportunity either to hear the evidence against him or to present exculpatory evidence himself.[16] In a case where

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[13] Section 2243 applies in non-criminal, non-punitive cases, like civil commitment. *E.g., Lake v. Cameron*, 331 F.2d 771, 771-72 (D.C. Cir. 1964).

[14] In addition, employing the All Writs Act, 28 U.S.C. § 1651, this Court has gone to great lengths to ensure factual discovery is available to a *habeas* petitioner. *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("[T]he petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition.").

[15] The Fourth Circuit repeatedly emphasized that the *habeas* petition submitted by Hamdi's counsel conceded that Hamdi was captured in Afghanistan during a time of hostilities and that because these "undisputed" facts were dispositive, no further factual review was required. *Hamdi*, 316 F.3d at 459. Hamdi was never permitted to speak to the lawyers who prepared the petition on his behalf; the Fourth Circuit's finding that the petition contained admissions of dispositive facts demonstrates the danger of a detainee's having counsel with whom he cannot communicate.

[16] Because there has been no hearing setting out a record for review, the "some evidence" standard of review is inapposite. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 663-64 (1988).

habeas corpus represents the first and only chance for having a hearing, statutory law, as well as constitutional due process, require full factual review.

Although the Fourth Circuit acknowledged that the "ordinary § 2241 proceeding" would require factual development under Sections 2243 and 2246, it concluded that this case does not permit it, because an Article III inquiry would unduly intrude on the Articles I and II war-making powers of the executive. *Hamdi*, 316 F.3d at 470. If Congress had intended to abridge the procedural rights of *habeas corpus* petitioners in times of hostilities, it has certainly had ample opportunity to enact legislation to do so. But, as noted above, even Territo – an American citizen captured in Italian uniform in Italy during the Second World War – was afforded review of the factual basis of his detention. *In re Territo*, 156 F.2d 142. Surely a citizen in Hamdi's situation should be accorded at least this same level of due process.

D. Adequate Procedures Exist To Protect National Security Interests Without Depriving A Citizen Of His Due Process Rights To Challenge An Unlimited Detention By The Executive.

The executive obviously has important and appropriate interests in protecting classified information from disclosure. Even assuming that classified information is at risk of disclosure in this case, however, national security interests cannot justify the total extinguishment of an American citizen's due process rights. As this Court has held, if confidential information is at stake, the court must weigh the detainee's inherent liberty interest against the need for protecting the particular information at stake. *Roviaro v. United States*, 353 U.S. 53, 62 (1957). If the detainee has no alternative means of obtaining essential evidence that is

classified, the court must sufficiently "probe [as to satisfy] itself" that the national security requires that the information not be made public. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

Even if a court determines that national security demands that sensitive pleadings and documents not be made publicly available, options exist for limiting access to classified information in ways that preserve the detainee's due process rights, while also minimizing the danger of disclosing classified information. For instance, the court may require defense attorneys to submit to security clearance background checks.[17] The court may also limit the detainee's telephone and mail access and create guidelines for the detainee's attorney to follow with regard to client access.[18]

In addition, the court could use the procedures set forth in the Classified Information Procedures Act, 18 U.S.C.A. app. 3 §§ 1 *et seq.* ("CIPA"). Pursuant to CIPA, the court has a variety of procedures for protecting sensitive

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[17] As demonstrated in the 1998 United States Embassy bombing trial, national security concerns can be overcome by such measures as requiring the public defenders to undergo federal background checks in order to represent their clients. *See* Phil Hirschkorn, *Security Clearances Required for Defense Attorneys in Embassy Bombings Case* (Jan. 26, 2001), available at http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/trial.report/trial.report.1.26

[18] Classified information concerns were addressed in the Zacarias Moussaoui prosecution through the creation of measures limiting the detainee's access to the telephone and mail and communications with the detainee's attorney. *See* Memorandum for Benigno G. Reyna, *Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Pre-Trial Detainee Zacarias Moussaoui*, available at http://news.findlaw.com/hdocs/docs/moussaoui/usmouss41702gsam.pdf.

information while still providing the detainee with a meaningful opportunity to litigate his case. For example, the court could allow the government to delete specified items of classified information from documents produced to the defendant. *Id.* § 4. Alternatively, the government could substitute the classified information with a statement admitting relevant facts or with a summary of the specific classified information. *Id.* § 6(c)(1). The court also has the option of ordering that all records be sealed. *See id.* § 6(d). Furthermore, the court could follow the safety procedures the Chief Justice of the United States established for the protection of classified information, including the designation of a court security officer, ensuring the proceedings occur in secure quarters and arranging for safe storage of the classified materials. *Id.* § 9.

An American citizen's right to meaningful judicial review of his detention cannot be denied simply because the alleged evidence against him is sensitive in nature. Through the implementation of appropriate measures, courts can preserve a citizen's constitutional right to meaningful judicial review, while also protecting the nation's legitimate security interests.

CONCLUSION

The Constitution requires that the courts engage in a meaningful judicial review when a U. S. citizen has been detained, and that the detained citizen be permitted meaningful access to the courts, including the opportunity for effective representation by counsel. The judgment of the United States Court of Appeals for the Fourth Circuit should therefore be reversed.

Respectfully submitted,

DENNIS W. ARCHER,
PRESIDENT*
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5000
BARRY SULLIVAN
SHELLEY MALINOWSKI
ROBERT L. SCHULTZ
ERINN L. WEHRMAN
COUNSEL FOR AMICUS CURIAE
Counsel of Record

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February 10, 2003

AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
CRIMINAL JUSTICE SECTION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SENIOR LAWYERS DIVISION
GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges that U. S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to

accommodate the needs of the detainee and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U. S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and

FURTHER RESOLVED, That the American Bar Association urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

REPORT

I. INTRODUCTION

The September 11, 2001, attack on the United States forced Americans to recognize new enemies of our nation. We are confronted by groups of individuals of varying nationalities, operating throughout the world, who are committed to murdering innocent men, women, and children associated with the United States; destroying both government and private property in the United States; and creating a climate of fear among Americans at home and abroad. The openly-declared goal of one of these groups, al Qaeda, to wage a holy war against this country, has forced Congress and the President to take unprecedented steps to ensure the safety of this nation and of innocents worldwide.

September 11 and other terrorist attacks, at home and abroad, raise difficult questions for our legal and political systems. For more than two hundred years, whenever this

nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. In times of war that balance may shift appropriately toward security. Our national experience has taught, however, that we must always guard against the dangers of overreaction and undue trespass on individual rights, lest we lose the freedoms which are the greatness of America.

We have struggled to achieve a proper balance in the past, and we face the same struggle today. As Supreme Court Justice Murphy warned in a case arising during World War II:

> [W]e must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)). As the Supreme Court noted in a different era, "'war power' cannot be invoked as a talismanic incantation . . . Even the war power does not remove constitutional limitations safeguarding essential liberties." *United States v. Robel*, 398 U.S. 258, 264 (1967).

The recent cases of Yaser Hamdi[1] and Jose Padilla,[2] bring this potential danger into sharp relief and raise troublesome and profound issues. Both U. S. citizens, they have been designated as "enemy combatants" and detained incommunicado without access to counsel or meaningful judicial review. Indeed, as the United States Court of Appeals for the Fourth Circuit has observed, the government has taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[3]

We recognize the government's responsibility to do everything possible to prevent another attack on our nation, but we also worry that the methods employed in the Hamdi and Padilla cases risk the use of excessive government power

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[1] Yaser Hamdi was captured during the hostilities in Afghanistan, and was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba in January 2002. When it was discovered that he was born in the United States and may not have renounced his citizenship, he was brought to the Naval Brig in Norfolk, Virginia, in April 2002. He has been continuously detained there as an "enemy combatant."

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002, pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was declared to be an "enemy combatant," transferred to the control of the United States military, and transported to the Naval Consolidated Brig in Charleston, South Carolina.

[3] *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).We note that both the Hamdi and Padilla cases are in litigation, and facts and arguments may emerge that have not been made public. It is not our purpose to address these cases specifically, but rather to discuss the implications of them and the principles we believe should be considered as our nation confronts the broader questions they raise.

and threaten the checks and balances necessary in our federal system. How we deal with citizens and other persons lawfully present in the United States who are suspected of terrorist activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of then-President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants in March 2002 to examine these issues.[4]

The charge of the Task Force was to examine the framework surrounding the detention of United States citizens declared to be "enemy combatants" and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions. The Task Force issued a Preliminary Report on August 8, 2002, which was widely circulated within the ABA, the Congress, and the Executive Branch.

Following the release of the Task Force's Preliminary Report, the ABA Criminal Justice Section and the Section of Individual Rights & Responsibilities formed their own working groups, which worked with each other and with the Task Force to further review these important issues.[5] Their

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[4] The Task Force is chaired by Neal R. Sonnett, and includes John S. Cooke, Eugene R. Fidell, Albert J. Krieger, Stephen A. Saltzburg, and Suzanne E. Spaulding.

[5] The Criminal Justice Section working group, appointed by Section chair Albert J. Krieger, was headed by Margaret Love and included Kenneth Bass, Frank Bowman, R.J. Cinquegrana and Marc Jones. The

invaluable input and cosponsorship has contributed substantially to this Report.

These Recommendations do not attempt to address the detention of foreign nationals in immigration proceedings,[6] individuals held as material witnesses,[7] or foreign nationals held as "enemy combatants" at Guantanamo Bay, Cuba, or elsewhere outside the United States.[8] Rather, they focus on the proper safeguards which should be employed when the government designates U. S. citizens or other persons lawfully present in the United States[9] as "enemy combatants" and detains them within the

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IRR working group, appointed by Section chair Mark Agrast, was headed by John Payton and included Michael Greenberger, John Podesta, and Jeffrey Robinson.

[6] Those concerns were addressed by the House of Delegates at the 2002 Annual Meeting when it overwhelmingly passed Report 115B, which opposed the incommunicado detention of foreign nationals in undisclosed locations by the INS and urged the adoption of due process protections in immigration proceedings.

[7] It is worth noting that, pursuant to 18 U.S.C.A. § 3006A (a)(1)(G), material witnesses have a statutory right to appointed counsel. See *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western Dist. of Texas*, 612 F.Supp. 940 (W.D.Tex.1985). Indeed, Jose Padilla had counsel appointed to represent him when he was originally arrested pursuant to a material witness warrant.

[8] Two United States District Courts have recently dismissed habeas corpus claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts. *See Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 1760825 (D.D.C. 2002).

[9] By "other persons lawfully present in the United States," we refer to permanent residents and other non-citizens lawfully in this country at the time of their designation as "enemy combatants." This would not include, for example, aliens taken into custody outside our nation's borders and

United States indefinitely without meaningful judicial review and access to counsel.

II. LEGAL FRAMEWORK

A. The "Enemy Combatant" Designation

The government maintains that individuals declared to be "enemy combatants" may be detained indefinitely and have no right under the laws and customs of war or the Constitution to meet with counsel concerning their detention. The term "enemy combatant" is not a term of art which has a long established meaning. According to one commentator:

> Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U. S. criminal law, international law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Solis, "Even a 'Bad Man' Has Rights," *Washington Post*, Tuesday, June 25, 2002, Page A19.

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then brought here for confinement, or persons who entered the United States unlawfully in the first place.

The term "enemy combatant" actually encompasses two previously-recognized classes of detainees during wartime: lawful and unlawful combatants. Each is subject to capture and detention for the duration of a conflict. "Lawful combatants," or prisoners of war, are entitled to the substantive and procedural protections set forth in the Third Geneva Convention of 1949, such as the right to the exercise of religion, the ability to correspond with persons outside detention and to keep personal effects, and the entitlement to living conditions equivalent to the soldiers of the detaining power. "Unlawful combatants" do not receive these protections, and may additionally be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

Article 4 of the Third Geneva Convention states that members of a military organization qualify for prisoner-of-war status if (1) they are commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the law and customs of war. Under the law of war, then, the term "lawful combatant" typically refers to a member of a state's armed forces.[10] These individuals wear uniforms and carry distinctive identification to clearly distinguish them from civilians.

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[10] *See* Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

Article 4 also provides that persons who engage in belligerent acts without meeting these criteria may be labeled "unlawful combatants." The Supreme Court has described an unlawful combatant as "[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." *Quirin*, 317 U.S. at 31.

The government maintains that its power to designate an individual as an "enemy combatant," and to detain that person for the duration of the present conflict without bringing criminal charges, derives from the laws of war and Supreme Court precedent. It has relied on *Quirin* and other cases to support its detention of Jose Padilla and Yaser Hamdi.

These same authorities, however, support a right to judicial review of such status. The *Quirin* case, for example, does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel. *See also In re Territo*, 156 F.2d 142 (9th Cir. 1946). Since the Supreme Court has decided that even enemy aliens not lawfully within the United States are entitled to review, that right could hardly be denied to U. S. citizens and other persons lawfully present in the United States.[11]

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[11] "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court.

B. United States Law

Neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks address or expressly authorize the detention of United States citizens as "enemy combatants." That is an important consideration, since existing law calls such detention into serious question.

In 1971, Congress enacted 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The House Report accompanying the legislation stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950. *See* H.R. Rep. No. 92-116, at 1435 (1971).[12]

The Detention Act had aroused much concern as a potential instrument for apprehending and detaining citizens because they held unpopular beliefs. *See id.* at 1436. The

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In *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.' *Id.*, 317 U.S. at 25, 63 S.Ct. at 9, 87 L.Ed. 3. This we did in the face of a presidential proclamation denying such prisoners access to our courts." *Johnson v. Eisentrager*, 339 U.S. 763, 794-95, 70 S.Ct. 936, 951-52 (1950) (Justice Black dissenting).

[12] The Emergency Detention Act of 1950 authorized the establishment of domestic detention camps. The Act had been enacted at the beginning of the Korean War in order to allow for the apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage. H.R. Rep.92-116, at 1435-36.

House Report also noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at 1438. Further, the Report found that "the provisions of the Act for judicial review are inadequate in that they permit the government to refuse to divulge information essential to a defense." *Id.*

This statute suggests that no U. S. citizen can be detained by the federal government except pursuant to an Act of Congress. *See Howe v. Smith*, 452 U.S. 452, 479 n.3 (1981) (finding that the plain language of § 4001(a) proscribed "detention *of any kind* by the United States, absent a congressional grant of authority to detain").[13] A person detained as an "enemy combatant" should have the right to a judicial determination whether this statute pertains to his case.

C. International Human Rights Laws and Treaties

International agreements recognized by the United States also suggest a detainee's right to judicial review and

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[13] The Administration maintains that the September 18, 2001 Joint Resolution of Congress is an "Act of Congress" that supports the detentions, *see* letter from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, at http://www.abanet.org/poladv/new/enemycombatantresponse.pdf but, as noted above, the language of the Joint Resolution contains no such express authorization. As further discussed *infra*, one Member of Congress has introduced legislation to provide authorization for detention of "enemy combatants" under stringent safeguards, including access to counsel and judicial review.

access to counsel. They include Articles 8 and 9 of the Universal Declaration of Human Rights[14] and the International Covenant on Civil and Political Rights (ICCPR),[15] which attempt to protect individuals from arbitrary detention, and guarantee a meaningful review of a detainee's status.

Moreover, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, requires that "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." Principle 18 entitles such a detainee to "communicate and consult with his legal counsel," with "adequate time and facilities for consultation," including visits by counsel "without delay or censorship and in full confidentiality." According to Principle 18, these rights may be limited only in "exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order."

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[14] Article 8 declares that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile.

[15] Article 14 of the ICCPR, which describes certain standards and procedures that should be used in all courts and tribunals, was also referenced in a Report and Recommendation adopted by the House of Delegates at the February 2002 Midyear meeting relating to the President's November 13, 2001, Military Order regarding use of Military Commissions. *See* Revised Report 8C, available at: http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf.

While we do not urge, as does Principle 17(2), that detainees should have a *right* to have assigned or appointed legal counsel provided to them by a judicial or other authority, we do strongly maintain that *access* to retained or volunteer counsel should not be denied to detainees.

III. DETAINEES SHOULD BE AFFORDED MEANINGFUL JUDICIAL REVIEW OF THEIR STATUS.

The government's power to detain persons who are not charged with criminal offenses is not absolute. United States citizens and persons lawfully within the United States have the Constitutional right to seek review of their detention status through a petition for writ of habeas corpus. The right of habeas corpus is fundamental and has not been suspended by Congress. Therefore, detainees who have not been charged with a crime or a violation of the law of war should be afforded a prompt opportunity for meaningful judicial review of the basis for their detention as "enemy combatants."

A. Detainees Have a Right to Judicial Review to Determine Whether There is a Factual and Legal Basis for Their Detention

By direct constitutional command, the writ of habeas corpus provides access to the federal courts to challenge detentions of persons by the Executive.[16] The Constitution provides that "the privilege of the Writ of Habeas Corpus

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[16] "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 121 S.Ct. 2271, 2280 (2001).

shall not be suspended" except by Congress,[17] and then only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, Sec. 9, cl. 2. As difficult and testing as the current struggle against terrorism surely is, it is neither a rebellion nor an invasion. Moreover, Congress has not acted to suspend the writ of habeas corpus.

The Supreme Court has recognized the right of a detainee in wartime to challenge the factual basis for his detention through the habeas corpus procedure. *See, e.g., Quirin*, 317 U.S. at 24; *Milligan*, 71 U.S. at 122. In *Quirin*, German saboteurs during World War II landed in New York and Florida, buried their uniforms upon landing, and proceeded inland in civilian dress.[18] Before they were able to carry out their plans, they were arrested, prosecuted and convicted by military tribunals for war crimes, and six of them were sentenced to death. The Supreme Court upheld their designation as unlawful combatants, and their detention for trial by military commissions authorized by the Constitution and the Articles of War enacted by Congress. *Id.* at 47. Nevertheless, the Court affirmed their right to review of their detention, stating:

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[17] *Id.* at 2281 n. 24 (endorsing the view that the Suspension Clause "was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress." *Quoting Ex Parte Bollman*, 4 Cranch 75, 95, 2 L.Ed. 554 (1807)).

[18] *Quirin*, of course, arose during a declared war against nations who were identified enemies. Although two of the detainees claimed to have American citizenship, that claim was not central to the case, and the Supreme Court had little difficulty in finding that Americans who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces of the enemy country.

> [T]here is certainly nothing in the Proclamation [regarding military tribunals] to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.

Id. at 25.

The review is not intended to determine the detainee's guilt or innocence, but is limited to an inquiry of whether the Executive Branch, given substantial deference, has a factual basis for the detention. *See In re Yamashita*, 327 U.S. 1, 8 (1946); *Quirin*, 317 U.S. at 39; *Colepaugh v. Looney*, 235 F.2d 429, 432-33 (1956) (discussing factual contentions that "involves [] matter[s] of fact directly bearing on [detainee's] guilt or innocence" and holding such matters "not within the scope of this inquiry").

This right to challenge the legal basis for the domestic detention of an "enemy combatant" cannot be removed from federal judicial review. As stated by the Tenth Circuit in Colepaugh, the Executive Branch:

> ...could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man.

235 F.2d at 431; *see also In re Yamashita*, 327 U.S. at 8 ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner."). And, while it is beyond the scope of this Report, there is also support for the proposition that the government may not avoid such review by removing the detainee from the United States.[19]

In the current conflict, the government has asserted conflicting views on the power of the courts to review the factual basis for its designation of "enemy combatants." In *Hamdi v. Rumsfeld*, the government argued that the court "may not review at all its designation of an American citizen as an enemy combatant" because "[the government's] determinations on this score are the first and final word." *See* 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit refused to dismiss Hamdi's habeas petition on this ground and remanded the case to the district court, because "[i]n dismissing, we ourselves would be embracing a sweeping proposition – namely that, with no judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.*

More recently, the government softened its position on judicial review. In its response to Jose Padilla's Petition for a Writ of Habeas Corpus, the government suggested that an

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[19] *See Ex parte Endo*, 323 U.S. 283, 304-306 (1944) (Douglas, J.) (holding that where petitioner had been removed from the district in which the petition was filed, district court could act on habeas petition if there was a respondent within the jurisdictional reach of the court); *Hirota v. MacArthur*, 338 U.S. 197, 202 (1948) (Douglas, J., concurring) (construing *Endo*).

individual would have the right to challenge the factual basis for the "enemy combatant" designation:

> To the extent that the courts conclude that judicial review may be had of an executive determination during a war that an individual is an enemy combatant, such review is limited to confirming based on some evidence the existence of a factual basis supporting the determination.

See Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. 2002), at 15 (citing *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998)).[20]

In addition, the General Counsel of the Department of Defense, in a letter to this Association, has stated that "the government welcomes meaningful judicial review of its detention in the United States of 'enemy combatants.'"[21]

B. Substantial, But Not Absolute Deference Should Be Given to Executive Designations of "Enemy Combatants"

U. S. courts have generally deferred to military judgments concerning POW status and related questions. *See Johnson*,

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[20] The Government also argues, however, that this inquiry should be limited to confirming that the government has "some evidence" supporting its designation. *See id.* at 18-19.

[21] *See* letter dated September 23, 2002 from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, President of the ABA, available at: http://www.abanet.org/poladv/new/enemycombatantresponse.pdf.

339 U.S. at 763; *Hamdi*, 296 F.3d at 281-82.[22] This deference flows from the President's primary responsibility for foreign affairs and the prosecution of war, and from a recognition of the potential damage judicial interference may cause in military operations. Judicial deference to a President's decision is warranted with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Endo*, 323 U.S. at 302; *Hamdi*, 296 F.3d at 278. However, the courts may give the Executive less deference in circumstances involving U. S. citizens not on the battlefield or in the zone of military operations. *See Youngstown*, 343 U.S. at 587; *Duncan*, 327 U.S. at 304.

Courts have preserved their role in reviewing Executive detention even in times of war. *See, e.g., United States v. Robel*, 407 U.S. 297, 318-19 (1972) ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal."); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (holding meaningful review of enemy combatant status is required), *on remand*, E.D. Va., 2:02-439, Order, 8/16/02, at 2 ("While it is clear that the executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of these designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens."); *United States v. Lindh*, 2002 U.S. Dist. LEXIS 12683

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[22] *See also Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

(deference does not mean "conclusive deference" or "judicial abstention").

IV. DETAINEES SHOULD NOT BE DENIED ACCESS TO COUNSEL

A citizen or other person lawfully within the United States who is detained within the United States should not be denied access to the courts for the purpose of seeking habeas corpus relief. Toward that end, he should, at the very least, have the right to contact and communicate with an attorney in order to facilitate a request for relief.

While there may be circumstances in which providing a detainee with access to counsel would be unwise, due to the geographical location and the state of hostilities,[23] citizens and other persons lawfully present in the United States detained within the United States, far from the battlefield, should not fall within that category. Indeed, the right to prompt judicial review may well be hollow unless citizen detainees are afforded meaningful access to counsel and to the effective assistance of counsel in order to appropriately challenge their detention.

The government's concerns that access to counsel may impede the collection of intelligence, or that counsel might facilitate communications with others, do not justify denial of access to counsel. These concerns are frequently overcome in sensitive criminal prosecutions, as in the case of

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[23] For example, no reasonable person would suggest that the battle should pause while a combatant captured and detained on the battlefield is granted a visit from his or her lawyer.

the 1993 World Trade Center bombers[24] and the current Moussaoui prosecution,[25] where defense attorneys (or standby attorneys) were required to submit to security clearance background checks and the courts have not hesitated to place sensitive pleadings and documents under seal.[26] Lawyers can provide effective representation – and have, in numerous cases – without threatening the nation's security.

The Sixth Amendment right to counsel is limited to traditional criminal prosecutions. *See, e.g., Middendorf v. Henry*, 425 U.S. 25, 36-42 (1976) (holding no Sixth Amendment right to counsel in summary court-martial proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973) (holding no Sixth Amendment right to counsel in probation or parole revocation hearings).

While the Sixth Amendment does not technically attach to uncharged "enemy combatants," there is no dispute that individuals who have been criminally charged do have a Sixth Amendment **right** to counsel, and it is both paradoxical and unsatisfactory that uncharged U. S. citizen

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[24] *See* Phil Hirschkorn, *Security clearances required for defense attorneys in embassy bombings case* (Jan. 26, 2001), available at http://www.cnn.com/LAW/trials.and.cases/case.files/0012/embassy.bombing/trial.report/trial.report.1.26.

[25] *See* "Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Pre-Trial Detainee Zacarias Moussaoui," available at http://news.findlaw.com/cnn/docs/terrorism/usmouss41702gsam.pdf.

[26] Indeed, broad and substantial protection of classified information has long been afforded in federal criminal cases by the Classified Information Procedures Act of 1980 (CIPA). *See* Title 18, U.S.C. App III.

detainees have fewer rights and protections than those who have been charged with serious criminal offenses.

The Sixth Amendment does not guarantee a detainee's right to the assistance of counsel in the preparation and presentation of a habeas petition, but a right of access to counsel in habeas proceedings is implicit in the Fifth Amendment's Due Process Clause. *See Middendorf*, 425 U.S. at 34 ("This conclusion [that the Sixth Amendment did not apply], of course, does not answer the ultimate question of whether the plaintiffs are entitled to counsel . . . but it does shift the frame of reference from the Sixth Amendment[] . . . to the Fifth Amendment's prohibition against the deprivation of 'life, liberty, or property, without due process of law.'"). A noncriminal proceeding which may result in confinement may require affording the right to counsel. *See In re Gault*, 387 U.S. 1, 30 (1967) (grounding right to counsel to juveniles facing confinement in the "essentials of due process and fair treatment"); *see also Middendorf*, 425 U.S. at 47 (holding due process did not mandate assistance of counsel because defendant could simply opt out of summary court-martial procedure to receive the right to counsel).

In *Ex parte Hull*, the Supreme Court held that the "state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. 546, 549 (1941) (striking down a regulation that prohibited state prisoners from filing petitions for habeas corpus unless they were determined to be "properly drawn" by the parole board's legal investigator).

In a habeas proceeding brought by an "enemy combatant" detainee, the assistance of counsel is necessary to a meaningful opportunity to be heard. *See Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S.

545, 552 (1965). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . requires the guiding hand of counsel *at every step in the proceedings against him.*" *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

V. CONGRESS, IN COORDINATION WITH THE EXECUTIVE, SHOULD ESTABLISH CLEAR STANDARDS AND PROCEDURES

Congress, in coordination with the Executive Branch, should examine the issue of detaining U. S. citizens and other persons lawfully present in the United States as "enemy combatants," and should enact legislation establishing clear standards and procedures governing such detention. This is particularly necessary in light of the discussion of 18 U.S.C. §4001(a), *supra*.

Congress should monitor the Executive's detention practices in order to assure that they are consistent with Due Process, American tradition, and international law.[27] The Task Force acknowledges the need to give proper deference to the Executive Branch in times of crisis, but neither the Congress nor the Courts should hesitate to question actions which may impact upon or violate long cherished constitutional principles.

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[27] As part of its oversight authority, Congress should consider requiring periodic reports from the Executive, and should include a provision in the proposed Homeland Security Department providing the Inspector General with specific authority to investigate allegations regarding denial of access to counsel or violations of constitutional rights arising from continued detentions.

There has already been congressional response to the Preliminary Report of the Task Force. On October 16, 2002, Rep. Adam Schiff (D-CA) introduced H.R. 5684, "The Detention of Enemy Combatants Act." Section 4 of the bill, entitled "Procedural Requirements" provides for the promulgation of rules with "clear standards and procedures governing detention of a United States person or resident" and provides that such rules shall **"guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel."**[28]

VI. CONSIDERATION OF HOW U. S. POLICY MAY AFFECT THE RESPONSE OF OTHER NATIONS TO FUTURE ACTS OF TERRORISM.

Finally, our Recommendation urges that in setting and executing national policy regarding U. S. citizens and other persons lawfully present in the United States who are detained within the United States based on their designation as "enemy combatants," the Executive and Legislative Branches should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

VII. CONCLUSION

In 1866, Justice Davis, writing for the Court in *Ex Parte Milligan*, stated that, "No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people . . . By the protection of the law human rights are secured; withdraw that

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[28] *See* H.R. 5684, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.05684: (emphasis added).

protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." 71 U.S. 2, 119 (1866). In July 1942, the Justices of the Supreme Court convened a Special Term of the Court to hear arguments in the *Quirin* case. Today, the questions raised by detention of "enemy combatants" are no less grave.

We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy. We must ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[29]

The proposed Recommendations should be adopted by the ABA House of Delegates in order to strike a proper balance between individual liberty and Executive power. We must get this right. The people of this great country deserve no less.

Respectfully submitted,

NEAL R. SONNETT,
Chair
Task Force on Treatment of Enemy
Combatants

February 2003

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[29] As Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

REPORT OF THE BOARD OF GOVERNORS

RECOMMENDATION*

RESOLVED, That the American Bar Association reaffirms its support for the Rule of Law in the international community and its recognition of the need for an independent judiciary and for the independence of lawyers and affirms its support for human rights advocates who are striving to uphold human rights and the rule of law.

FURTHER RESOLVED, that the American Bar Association authorizes the President of the Association, of the President's designee, to bring the concerns express in this resolution to the attention of the Government of the United States and, where appropriate, to foreign governments.

REPORT

In 1975 this House adopted a "Rule of Law Letter" policy, directing the Association to expressed to foreign governments the Association's concern about treatment and abuse of lawyers and judges striving to uphold basic human rights and the rule of law. The Board of Governors recommends that the House amend the 1975 policy to expand its protection to human rights advocates.

The 1975 policy authorized the ABA President to express the Association's concerns to foreign governments

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* The recommendation was approved. See page 54.

about circumstances in those lands which posed a clear and present threat to the rule of law, an independent judiciary and an independent legal profession. The policy has been implemented through the issuing of rule of law letters, a procedure which has raised the voice, visibility and credibility of the Association with bar associations, lawyers, judges and non-governmental human rights organizations internationally. Attached to this report is a recent example of such a letter.

The Association has developed a great deal of expertise and experience in this area since this policy authorizing the sending of rule of law letters was first adopted. Indeed, our direct experience suggests that there is a gap in the policy which should be corrected if the ABA is to continue to provide leadership in this area. Specifically, we find increasingly that troubling situations involving foreign justice systems do not involve solely lawyers or judges, but human rights advocates as well.

Often these human rights advocates–who can include lawyers and non-lawyers–are not challenging totalitarian authority in defense of a specific client; rather, these individuals are advocating for application of the rule of law, for fairness and uniformity in courts and the justice system and for basic human rights to be extended to all persons. In may nations, where the organized bar is not able to address to such issues, these human rights advocates provide the only leadership and representation on behalf of the average citizen in demanding that governments adopt and respect measures which constitute what is internationally understood as the rule of law.

Because these human rights advocates play this role in more and more situations–and are often punished or threatened for their activity–it is the view of many in the human rights community that the House of Delegates should

adjust our existing policy so that the ABA would be allowed to express our concern when these advocates are jailed, tortured or intimidated as part of a campaign to dissuade them from working on behalf of the cause of justice and the rule of law. The International Bar Association has already expended its work in the human rights field in order to include the ability to express its concerns about unsavory actions against human rights advocates.

The House's adoption of this recommendation will significantly strengthen the Association's efforts to advance fundamental freedoms and justice throughout the world.

REPORT OF THE
SECTION OF LITIGATION

RECOMMENDATION[•]

RESOLVED, That the American Bar Association opposes Congressional initiatives that infringe upon the separation of powers between Congress and the courts, and have the potential to inhibit the independence of the judiciary.

REPORT

Fully recognizing that, under Articles I and III of the Constitution, Congress is authorized to structure the federal courts, define their jurisdiction and determine what resources will be allocated for their use, the American Bar Association endorses and supports the recent remarks of Chief Justice William H. Rehnquist in response to the recently announced plan to require all federal judges to complete detailed questionnaires inquiring into the amount of time they devote to officials tasks.

The Chief Justice commented in part "there can be no doubt that answers to some form of such questions could aid Congress in making decisions about judicial salaries, permitted outside income from teaching, creating new judgeships and filling existing vacancies." He added, "There

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• [The recommendation was amended and approved by the ABA Board of Governors on April 1996.]

can also be no doubt, that the subject matter of the questions and the detail required for answering them could amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary."

Judicial independence is a cornerstone of American democracy and should not be undercut directly or indirectly through the funding process. The conduct in question has prompted an uncharacteristic response from the Chief Justice which strongly suggests that the threat is real and one on which the ABA should have policy to be able to play a role in preserving the independence of the federal judiciary from oversight that compromises the separation of powers so essential to an effective judicial branch.

Respectfully Submitted,

LAWRENCE J. FOX
Chair

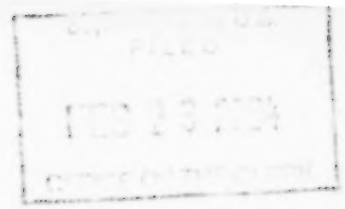
February 1996

Independence of the Judiciary, Resolution on

The Board approved the following resolution:

BE IT RESOLVED, That the American Bar Association Board of Governors, whose individual views span the political spectrum, expresses its deep concern over recent political attacks by both Democrats and Republicans on the independence of the judiciary and calls on lawyers everywhere to speak out on the critical role that an able, competent and independent judiciary plays in protecting the rights and freedoms of all Americans under the rule of law.

April 1996



No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* GLOBAL RIGHTS IN SUPPORT OF PETITIONERS

GAY L. MCDOUGALL
MARK BROMLEY
GLOBAL RIGHTS
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 822-4600

JAMES F. FITZPATRICK*
**Counsel of Record*
KATHLEEN A. BEHAN
JOSHUA A. LEVY
LESLIE M. HILL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Amicus Curiae

February 23, 2004

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

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INTERESTS OF AMICUS CURIAE[1]

Global Rights respectfully submits this brief in support of petitioners, Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi. Both parties have consented to the filing of this brief.

Global Rights is a non-profit public interest legal organization with projects in 22 countries engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as amicus curiae in numerous cases in the United States. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

Since the Allied victory in the Second World War, the United States has played a central role in the shaping of international human rights and humanitarian law. Nevertheless, the Government is violating its obligations under the Geneva Conventions of 1949 and the International Covenant on Civil and Political Rights, as well as customary international law, by arbitrarily detaining Yaser Esam Hamdi. The Executive's detention of Mr. Hamdi is arbitrary under international law, which is binding on the United States. *First*, Mr. Hamdi is being held outside the imprimatur of law and thus his detention is arbitrary *per se*. *Second*, the Executive has denied Mr. Hamdi

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amicus curiae*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

access to a competent tribunal within which to challenge the basis of his detention, depriving him of the process he is due.

The Court of Appeals for the Fourth Circuit incorrectly upheld the complete denial of process to Mr. Hamdi on the basis of the Executive's detention powers under Article II of the United States Constitution and Congress' Authorization for Use of Military Force ("Joint Resolution"). This Court has long considered international law when defining the scope of the Executive's detention powers during periods of conflict, when examining the breadth of an individual right, and when interpreting ambiguity in congressional acts. Read within the context of international law, neither Article II nor the Joint Resolution can support Mr. Hamdi's arbitrary detention. This case should therefore be remanded in order to provide Mr. Hamdi with a meaningful opportunity to challenge the basis of his detention.

ARGUMENT

I. INTRODUCTION

Speaking of his aspirations for Afghanistan, the President announced: "America will always stand firm for the non-negotiable demands of human dignity [including] the rule of law . . ." State of the Union Address, *at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html (Jan. 29, 2002) ("2002 State of the Union Address"). But by arbitrarily detaining Mr. Hamdi, the Executive has reneged upon this vital and longstanding national commitment.

The Second World War triggered a watershed in the advancement and recognition of basic human rights by nations and by the international community. Out of the horrible experiences of war came a deep distrust of any claim by a nation of absolute and unreviewable power. The international community, including the United States, came together to ensure that even in times of war the rule of law is observed. Stated another way, there are some basic human rights that simply must

be respected and indeed protected by all nations in all circumstances.[2]

In this case, the President, as Executive and Commander-in-Chief, has asserted virtually absolute power over Mr. Hamdi with disregard for those basic human rights that the United States has been instrumental in developing and defending around the world. The Executive has claimed the power to deprive Mr. Hamdi of his liberty indefinitely, of any and all right to counsel, of the right to know the charges against him, of the right to a meaningful opportunity to challenge the basis of his detention, and even of the right to be charged. Added to this deprivation of procedural rights is the fact that until only December 2003, Mr. Hamdi has been held largely incommunicado at a secret location, unable to communicate with nearly *anyone*, not just counsel, in conditions that are still unknown, and for a purpose that remains secret.[3] This assertion of power could not be more inconsistent with the structure of international human rights and humanitarian

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[2] The protection of these basic rights is not unique to international law, but instead is consistent with the traditional American system of checks and balances underpinning our own constitutional structure, ensuring the protection of individual liberties. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) ("[T]he founders . . . were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments."); *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.").

[3] *See* News Release, Department of Defense, DOD Announces Detainee Allowed Access to Lawyer, *at* http://www.defenselink.mil/releases/2003/nr20031202-0717.html (Dec. 2, 2003).

law that the United States has helped to create and promulgate, in the name of liberty and justice, to the rest of the world.[4]

Notwithstanding the fortitude of these laws, the United States Government now challenges their applicability to today's wartime detainees. Since the Second World War, the United States maintained the good fortune of not sustaining a major attack on its mainland. Military and economic strength, combined with an arsenal of foreign policy tools, kept our enemies in check. Among those policy tools have been the promotion of democracy, the rule of law, and the protection of human rights, combined with a keen awareness of reciprocity.[5] But the attacks on the United States in 2001 apparently have prompted the Government to disregard the requirements of the Geneva Conventions, the International Covenant on Civil and

[4] The Ninth Circuit remarked that denying detainees at Guantanamo Bay access to the federal courts "is at odds with the United States' longtime role as a leader in international efforts to codify and safeguard the rights of prisoners in wartime." *Gherebi v. Bush*, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003) (stating that the Government's position "is also at odds with one of the most important achievements of these efforts - the 1949 Geneva Conventions, which require that a competent tribunal determine the status of captured prisoners"); *see Robel*, 389 U.S. at 264 ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). For example, the United States played a significant role in forming the GPW. *See, e.g.*, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947) 4 (Int'l Comm. of the Red Cross 1947) ("Conference Report"). Representatives from the United States, along with representatives from fifteen other countries, attended the "Conference of Government Experts for the Study of the Conventions for the Protection of War Victims" in Geneva. Those countries participating "had detained or lost large numbers of prisoners of war and civilian internees, and thus had first-hand knowledge of the matters under discussion." *Id.*; Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 Am. J. Int'l L. 462, 466 (1951). The product of the Conference was the Conference Report that, after several revisions by the United States and other participants, became the GPW. *See* Pictet, *supra*, at 466-68. By February of 1950, sixty-one states, including the United States, China, France, Great Britain, and the U.S.S.R, had signed the final version. *Id.* at 468.

[5] *See* Thomas Paine, *Dissertation on First Principles of Government*, *in* 2 *The Complete Writings Of Thomas Paine* 588 (Philip S. Foner ed., 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.").

Political Rights, and customary international law regarding the laws of detention and, in the Government's haste to act, have dangerously undermined the fundamental foreign policies that have been the foundation of our relations with the world community. Global Rights urges the critical importance of our country steadfastly adhering to the rule of law – rather than accepting arbitrary justice and the vagaries of Executive whim.[6]

II. THE GOVERNMENT'S DETENTION OF MR. HAMDI IS ARBITRARY UNDER INTERNATIONAL LAW.

The Government's detention of Mr. Hamdi is arbitrary under international law because the Government (1) is holding him outside the imprimatur of law and (2) has never provided him with a competent tribunal within which to challenge the basis of his detention.

A. The Government Cannot Detain Mr. Hamdi Outside the Imprimatur of Law.

By detaining Mr. Hamdi under an invented classification, the Government has violated the well-settled principle of customary international law that "[e]very person in enemy hands must have some status under international law." International Committee of the Red Cross, *Commentary Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in*

[6] Following the Government's argument that it should be permitted to indefinitely hold the Guantanamo Bay detainees, the Court of Appeals for the Ninth Circuit considered whether the Government was also free to torture or summarily execute the detainees. *See Gherebi*, 352 F.3d at 1299-1300. The Court stated that "the government advised [ ] that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Id.* ("To our knowledge . . . the U.S. government has never before asserted such a grave and startling proposition.").

Time of War, at 51 (1958) ("There is no intermediate status; nobody in enemy hands can fall outside the law.").[7]

1. International Law Does Not Recognize the Executive's Invented "Enemy Combatant" Classification.

The Government's contrived classification of Mr. Hamdi as a so-called "enemy combatant" is flawed because "enemy combatant" is not a "status under international law." The Third and Fourth Geneva Conventions, ratified and thus binding on the United States,[8] create protected legal status for certain detainees, but do not establish a classification of "enemy combatants."

First, the Third Geneva Convention presumes that persons captured on the field of battle – as was Mr. Hamdi – should be protected under the GPW as prisoners of war ("POW"). *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, arts. 4-5, 75 U.N.T.S. 135 (entered into force with respect to the United

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[7] The International Criminal Tribunal for the Former Yugoslavia, charged with prosecuting war crimes and crimes against humanity, has explicitly affirmed this principle in a 1998 judgment, stating that: "[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied." *Prosecutor v. Zejnil Delali*, No. IT-96-21-T, para. 271 (I.C.T.Y. 1998), *available at* http://www.un.org/icty/celebici/ trialc2/judgement/cel-tj981116e.pdf.

[8] After ratification and deposit of the treaty instrument, the GPW and Fourth Geneva Convention took effect with regard to the United States on Feb. 2, 1956. Treaties, such as the GPW, are agreements among sovereign powers that, once ratified by the United States, are the supreme law of the land. U.S. Const. art. II, § 2, art. VI, cl. 2; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (stating that "a treaty ratified by the United States is . . . the law of this land, see U.S. Const., Art. II, § 2"); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 42 (1997) (stating that "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

States Feb. 2, 1956) ("GPW").[9] Should there be any doubt as to that presumption, then the detaining power shall establish a competent tribunal to review the detainee's status to determine whether he should be protected under the GPW. *See* GPW art. 5. Those determined not to be POWs are not protected under the GPW.[10]

Second, the Fourth Geneva Convention protects civilians who were either captured on the field of battle or held by an occupying force. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force with respect to the United States Feb. 2, 1956) ("Fourth Geneva Convention"). The Fourth Geneva

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[9] Questions of whether the Geneva Conventions are self-executing should be put to rest. When treaties are "self-executing," they create a private right of action "without the aid of any legislation." *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). When a ratified treaty is not self-executing, separate legislation is required to create a right of action. In Mr. Hamdi's case, the habeas statute creates a right of action, personal to him, to challenge his detention, because he is held in custody "in violation of the Constitution or laws or *treaties of the United States*." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added). Thus, regardless of whether the Geneva Conventions or other treaties are self-executing, Mr. Hamdi may lawfully allege in federal court that the Government's detention of him violates those treaties' requirements.

[10] Although the United States has not adopted the Additional Protocol I to the Geneva Conventions of 1977, the Protocol would protect "[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party" as a POW. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 44(1), Jan. 23, 1979, 1125 U.N.T.S. 3 ("Additional Protocol I"). According to the Protocol, a "combatant" retains this status as a POW even if he violates the laws of war so long as the combatant carries arms openly during military operations. *Id.* art. 44(2)-(3). Even if a combatant fails to maintain protection because he or she fails to openly carry arms while engaged in military activities, the Protocol requires that the combatant be given the protections "equivalent in all respects to those accorded to prisoners of war by the [GPW] and by this Protocol." *Id.* art. 44(4). Lastly, Additional Protocol I includes a fundamental guarantee of fair treatment for anyone that does not benefit from more favorable treatment. *Id.* art. 75(1). This guarantee provides that "[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." *Id.* art. 75(3).

Convention expressly eliminates from its protection persons not citizens of the Detaining Power when: (1) such persons are "definitely suspected of or engaged in activities hostile to the security of the State," and (2) allowing such persons to exercise their rights under the Fourth Convention would "be prejudicial to the security of the State." Fourth Geneva Convention art. 5. The Fourth Convention also expressly eliminates from its protections civilians held by an occupying force upon a showing that: (1) such civilians are either "detained as a spy or saboteur" or are "under definite suspicion of activity hostile to the security of the Occupying Power," and (2) "absolute military security so requires" the elimination of their protection. *Id.* Significantly, neither the GPW nor the Fourth Convention uses the term "enemy combatant."

Persons not protected under either the GPW or the Fourth Geneva Convention are nevertheless protected from arbitrary detention under the International Covenant on Civil and Political Rights ("ICCPR"),[11] ratified and thus binding on the United States,[12] and under customary international law. Even if those persons not protected by the Geneva Conventions are later prosecuted for offenses of war under domestic or international

[11] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"). The U.S. ratified the ICCPR on June 8, 1992. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22 (2002); ICCPR art. 48, para. 2; *see also* 138 Cong. Rec. 8069 (1992) (statement of Sen. Pell) ("The Covenant is part of the international community's early efforts to give the full force of international law to the principles of human rights embodied in the Universal Declaration of Human Rights and the United Nations Charter. The [ICCPR] is rooted in western legal and ethical values. The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.").

[12] ICCPR art. 9(1) (providing that "[n]o one shall be subjected to arbitrary arrest or detention"). As with the GPW, *see supra*, note 9, the self-executing nature of the ICCPR is not an impediment to the ICCPR's application. Article 9 contemplates *habeas* review, and Mr. Hamdi is availing himself of the habeas statute, which expressly provides relief to any person held in "custody in violation of the . . . treaties of the United States . . . ," 28 U.S.C. § 2241(c)(3). Section 2241 therefore executes Article 9 of the ICCPR for purposes of Mr. Hamdi's petition.

law as "unlawful combatants,"[13] the ICCPR and customary international law prohibit their arbitrary detention. Arbitrary detention is expressly prohibited under the ICCPR, which provides the basic human rights of liberty and security. *See* ICCPR art. 9(1). Specifically, the treaty provides that "[n]o one shall be subjected to arbitrary arrest or detention." *Id.*[14] Other

[13] The term "unlawful combatant" was defined by this Court. *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted).

[14] In interpreting the treaty, the Court should consider the intent of the parties to the treaty and their post-ratification understanding of the treaty. *See Cook v. United States*, 288 U.S. 102, 112 (1933) (consulting both treaty language and its history in construing the parties intent as to the limits of the treaty's operation.); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (stating that the Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Zicherman*, 516 U.S. at 226 (stating that the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties"). The post-ratification understanding of the term "arbitrary detention" is informed, in part, by foreign court decisions discussing the ICCPR or other conventions using the term. For example, the Court of Appeals for the Ninth Circuit found that indefinite detention of removable aliens could violate ICCPR art. 9. *See Ma v. Reno*, 208 F.3d 815, 829-30 (9th Cir. 2000) (recognizing indefinite detention of removable aliens could violate ICCPR art. 9), *vacated and remanded on other grounds sub nom Zadvydas v. Davis*, 533 U.S. 678 (2001).

sources of customary international law[15] also prohibit arbitrary detention. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h ("Restatement (Third)") (providing that detention is arbitrary if it "is not accompanied by notice of charges"); American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); *Alvarez-Machain v. United States*, 331 F.3d 604, 621 (9th Cir. 2003) (stating that detention is "arbitrary" and an abridgement of human rights when "it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (citations omitted).

Neither the ICCPR nor customary international law creates an exception from this prohibition on arbitrary detention for the

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[15] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102. It is "comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion." *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003), *cert. denied*, 123 S. Ct. 353 (2003) (citing Ian Brownlie, *Principles of Public International Law* 5-7 (5th ed. 1999)). The body of customary international law is not static, but evolves to include those offenses that the international community of nations universally prohibit. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (stating that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today . . . The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."); *Maria v. McElroy*, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999) (stating that "[c]ustomary international law is not static but fluid and evolving."). U.S. courts historically have determined its content by examining the practices of nations, as evidenced by treaties, U.N. declarations, court decisions, and scholarly writings. *See Filartiga*, 630 F.2d at 880 (2d Cir. 1980) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (examining scholarly writings to determine content of the "law of nations")); *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) ("We look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries."); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("Principles of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general customs and practice of nations and relevant judicial decisions.").

Executive's invented "enemy combatant" classification – a label apparently contrived as a rationalization to deny detainees any rights due under the law. Under clear precedent, individual countries must make sure not to detain arbitrarily even those persons not protected under the Geneva Conventions by establishing clear and lawful procedures for their detention, such as the Due Process Clause, the Federal Rules of Criminal Procedure, and the Uniform Code of Military Justice ("UCMJ") as implemented by the Manual for Courts-Martial ("MCM").[16] Thus, the President cannot declare through Executive fiat that a certain class of detainees is immune to the prohibition on arbitrary detention imposed by the ICCPR and customary international law. Stated another way, the Executive cannot hold Mr. Hamdi as an "enemy combatant" and thus outside the imprimatur of the law.

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[16] The MCM contains, *inter alia*, the Rules for Courts-Martial ("R.C.M.") that specify the pre-trial procedures for courts-martial under the UCMJ. *See* 10 U.S.C. § 836(a), art. 36(a). For example, if charged in a courts-martial under the UCMJ, the Government would promptly inform Mr. Hamdi of the charges against him and would provide him with the right to be represented by counsel, *see* 10 U.S.C. § 830(b), art. 30(b), as well as the right to obtain witnesses and evidence in his defense during the pretrial investigation before charges are brought. *See* 10 U.S.C. § 846, art. 46. If subject to general courts-martial, Mr. Hamdi would be afforded the right against self-incrimination, *see* 10 U.S.C. § 831, art. 31, the right to representation by military counsel, *see* 10 U.S.C. §§ 827, 838, arts. 27, 38, the right against double jeopardy, *see* 10 U.S.C. § 844(a), art. 44(a), and the presumption of innocence until proven guilty beyond a reasonable doubt, *see* 10 U.S.C. § 851(c), art. 51(c). Though the Government may detain individuals suspected of committing a crime punishable by courts-martial, 10 U.S.C. § 810, art. 10, once the Government places an individual in pretrial confinement, it must inform the individual of the charges against him, provide him access to counsel, and provide him military counsel upon request. *See* R.C.M. 305. The MCM guarantees detainees a more "rigorous" right to a speedy trial than does the Sixth Amendment. *United States v. Nelson*, 5 M.J. 189, 190 (C.M.A. 1978); *see* R.C.M. 707(a)(2) (implementing the speedy trial requirement by providing that the Government must try detainees within 120 days of confinement); *see also United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (considering the speedy trial required by 10 U.S.C. § 810, art. 10).

2. By Not Defining "Enemy Combatant," the Executive Has Deprived Mr. Hamdi of His Right to Be Notified of the Legal Basis of His Detention.

The Executive's contrived "enemy combatant" classification[17] does not exist at law; beyond that it is undefined. This predicament puts Mr. Hamdi in an impossible legal position: Even if he were afforded the opportunity to challenge the basis of his detention, he could not do so in the absence of a standard defining "enemy combatant."

The fact that the Government borrowed the term "enemy combatant" from a passing reference in a Supreme Court decision that pre-dates the Geneva Conventions does not provide Mr. Hamdi with sufficient notice of the legal standard purportedly supporting the basis of his detention. The Government incorrectly relies on the Supreme Court's decision in *Ex parte Quirin* to support the detention of Mr. Hamdi as an "enemy combatant." Br. in Opp'n to Pet. for Cert. at 14-15, 19; *see Ex parte Quirin*, 317 U.S. 1 (1942). Although the Court used the term "enemy combatant" in its discussion of wartime detainees, the Court never defined it. Instead, the Court invoked the term to elaborate upon the phrase "offender[ ] against the law of war."[18] Thus, neither *Quirin* nor any other source of law – U.S. or international – appears to provide Mr. Hamdi or this Court with any definition of "enemy combatant."

The Executive's failure to provide Mr. Hamdi with notice of the legal basis for his detention is arbitrary and unlawful

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[17] *See* Br. for the Resp'ts in Opp'n to the Pet. for Writ of Cert. at 3-4 ("Br. in Opp'n to Pet. for Cert.") (explaining that the Government is holding Mr. Hamdi as a so-called "enemy combatant").

[18] An offender against the law of war is, inter alia, "an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." *Quirin*, 317 U.S. at 31 (emphasis added). Furthermore, the *Quirin* case is factually inapposite to Mr. Hamdi's detention because the petitioners in *Quirin* were Nazi saboteurs and spies, who actually wore their uniforms to the U.S. shore and then removed them. *Id.* at 21. Detaining powers are not required to protect spies and saboteurs under the Geneva Conventions, *see* Fourth Geneva Convention art. 5; *see generally* GPW art. 4. Notably, the Government has never accused Mr. Hamdi of being either a spy or a saboteur.

under the ICCPR and customary international law. At least one U.S. appellate court has found that detention is arbitrary in the absence of providing an adequate explanation of the legal basis for the detention. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (stating that "[d]etention is arbitrary if 'it is not accompanied by notice of charges,'" among other things) (quoting Restatement (Third) § 702 cmt. h and ICCPR art. 9). In addition, the European Court of Human Rights stated that Article 5(2) of the European Convention on Human Rights "contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty." *Fox, Campbell & Hartley v. United Kingdom*, 13 Eur. Ct. H.R. (ser. A) at 170 (1990). Further, the European Court stated that "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4" of Article 5. *Id.*[19]

By stripping Mr. Hamdi of any recognized status under international law and by depriving him of the right under customary international law to notice of the legal basis of his detention, the Executive is arbitrarily detaining Mr. Hamdi under international law.

B. The Government's Detention of Mr. Hamdi Is Arbitrary under International Law Because the Government Has Deprived Him of a Meaningful Opportunity to Challenge the Basis of His Detention.

In addition to detaining Mr. Hamdi arbitrarily by classifying him with a status not authorized or defined by international law, the Government also has arbitrarily detained Mr. Hamdi by not providing him with a meaningful opportunity to challenge the basis of his detention. Such a requirement is required

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[19] The European Court of Human Rights also has required judges presiding over bond determination hearings to make sure that individuals are detained only upon a careful review of the legal standard for detention. *See TW v. Malta*, 29 Eur. H.R. Rep. 185, 189, para. 41 (2000) (requiring the judge to review the circumstances of detention by referring to legal criteria whether there are reasons to justify detention and to order the release if there are no such reasons).

not only by the GPW, but also by the ICCPR and customary international law.

1. Article 5 of the GPW Requires That Mr. Hamdi Be Provided With The Opportunity to Challenge the Basis of His Detention before a Competent Tribunal.

The denial of process violates Article 5 of the GPW. Where there is doubt as to whether an enemy belligerent deserves POW status, the GPW provides for determination of that status by a "competent tribunal," not by Executive fiat. *See* GPW art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.") (emphasis added).[20] During the 1991 Gulf War, for instance, the U.S. Government held over a thousand hearings to determine the status of Iraqi belligerents captured on the field of battle. *See* Final Report to Congress, Conduct of the Persian Gulf War, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25), April 1992, at 663 (stating that 1,196 tribunals were held during the Gulf War).

2. The "Process" Afforded to Mr. Hamdi Was Not Competent.

The process required for determining a detainee's status under the GPW far exceeds the process that the Court of Appeals for the Fourth Circuit thought to have been adequate. *Cf. Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003). According to the

[20] Incorporating Article 5 nearly verbatim into its corresponding regulations, the U.S. Army leaves no doubt as to how it should treat those captured in battle. *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Oct. 1, 1997, 2, 3 (hereinafter "AR 190-8") (App. 91-128) ("All persons taken into custody by U.S. forces will be provided with the protections of the [GPW] until some other legal status is determined by competent authority.") (referring to GPW art. 5). *See Gherebi*, 352 F.3d at 1283 n.7 (stating that the Geneva Conventions require "that a competent tribunal determine the status of captured prisoners"); *In re Territo*, 156 F.2d 142, 142-148 (9th Cir. 1996).

U.S. military's interpretation of the requirements for an Article 5 tribunal, Mr. Hamdi would be afforded the following procedural safeguards at his status-determination hearing, including the rights to:

> an open proceeding except for the deliberation and voting period or during presentation of evidence that "would compromise security;"
>
> be advised of his rights at the beginning of the tribunal;
>
> attend all open sessions and be provided with an interpreter;
>
> call witnesses and question those presented against him;
>
> testify or present his views to the tribunal;
>
> be protected against self-incrimination as to his status; and
>
> a determination of his status by majority vote under a preponderance of evidence standard.

AR 190-8 at 2, 3 (App. 96-97).[21] *See, e.g., Morgan v. United States*, 304 U.S. 1, 18 (1938) (stating that the right to a "'full hearing'-a fair and open hearing . . . embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them").

The review of Mr. Hamdi's status by the Court of Appeals for the Fourth Circuit panel is woefully inadequate when compared to the tribunal and procedures to which Mr. Hamdi is entitled under Article 5 of the GPW. The Court accepted, as sufficient process, the Government's unchallenged and unverifiable presentation of a two-page declaration of a Department of Defense official with no personal knowledge of Mr. Hamdi's detention. *See Hamdi*, 316 F.3d at 473; Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, July 24, 2002 ("Mobbs Declaration") (App. 61-62). The Government precluded Mr.

[21] AR 190-8 is a multi-service regulation binding the Army, Navy, Air Force and Marine Corps, and their reserve components. AR 190-8, at i (App. 93).

Hamdi from attending the Government's *ex parte* presentation of the Mobbs Declaration to the court, from enjoying any meaningful assistance from counsel, from presenting any testimony or other evidence, from questioning the facts alleged in the Mobbs Declaration, and from cross-examining Mr. Mobbs.[22] This is simply insufficient process for determining Mr. Hamdi's status in accordance with the Government's obligation to provide him with a competent tribunal under the GPW.

By denying Mr. Hamdi a meaningful opportunity to challenge his detention, the Government violated his rights under Article 9(4) of the ICCPR. That provision of the ICCPR provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[23] Mr. Hamdi's detention for nearly two years without the opportunity to challenge the Government's characterization of his status deprives him of the fundamental right to liberty and security embodied in Article 9(4).[24] In direct contravention of its obligations under Article 9(4), the Government has denied Mr. Hamdi "proceedings before a court" by precluding any testimony in refutation of his detention and by depriving him of the notice of the legal basis of his detention. This lack of process constitutes procedural arbitrariness under

[22] These aspects of process denied Mr. Hamdi constitute the fundamental features of process due to United States citizens. *See Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976).

[23] The Ninth Circuit recently noted that Article 9(4) of the ICCPR requires the United States to subject Executive detention to judicial review. *See Gherebi*, 352 F.3d at 1283 n.7 (quoting ICCPR art. 9(4)).

[24] The European Court of Human Rights has frequently held that detention is arbitrary, if the detainee is not permitted to present testimony in refutation of the basis for his detention. *See Caballero v. United Kingdom*, 30 Eur .H.R. Rep. 643, 652, paras. 42-44 (2000) (finding automatic denial of bail arbitrary, in part, because, the judge failed, having heard the accused himself, to examine all the facts relating to the existence of a genuine public interest justifying denial); *TW v. Malta*, 29 Eur. H.R. Rep. 185, 186, 196, paras. 30 & 34 (2000) (stating that the judicial officer must hear the detained person before determining whether detention should continue).

the ICCPR and must be remedied, if the United States is to comply with its obligations under the ICCPR.

3. The Government's Denial of a Competent Tribunal Cannot Be Justified without Formally Derogating from the ICCPR.

Although the ICCPR provides procedures for derogation from its prohibition on arbitrary detention, the Government has ignored those procedures by detaining Mr. Hamdi without providing him with a meaningful opportunity to challenge the basis of his detention. To derogate from the ICCPR, the derogating government must officially proclaim that the life of its nation is threatened. *See* ICCPR art. 4(1). Derogation is permitted only when it is "strictly required by the exigencies of the situation," and only when derogation does not involve discrimination and is consistent with the derogating government's other obligations under international law. *See id.*[25] The derogating power must also notify the other ICCPR parties through the Secretary General of the United Nations. *See* ICCPR art. 4(3). States historically have followed derogation procedures under emergency without adverse consequence.[26] By contrast, having not formally derogated from the ICCPR, the U.S. Government must adhere to it. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 25 (Jul. 8) ("The Court observes that the protection of the International

[25] Parties to the ICCPR may not derogate from certain of its articles. *See* ICCPR art. 4(2). However, Article 9, prohibiting arbitrary detention, is not among them. *See id.* Nevertheless, the United Nations Human Rights Committee, a panel of experts established to monitor ICCPR implementation, has stated that "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." U.N. Human Rights Comm., General Comment No. 29, para. 16 U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) ("General Comment No. 29").

[26] The British government recently derogated from the ICCPR to pass the Anti-Terrorism, Crime and Security Act of 2001. *See* United Nations Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/39 (2003). In addition, Algeria, Argentina, Colombia, Ecuador, Egypt, Ghana, Guatemala, Indonesia, Israel, Liberia, Nepal, Pakistan, Peru, Serbia and Montenegro, Sierra Leone, Sri Lanka, Syrian Arab Republic, Sudan, and Turkey all have formally derogated from the ICCPR. *See id.*

Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.").[27]

4. Any Attempt to Derogate from the ICCPR to Deprive Mr. Hamdi of a Competent Tribunal Would Fail Because the Exigencies of the Situation Do Not "Strictly Require" Derogation.

Even if the Government were to adhere to the ICCPR's formal derogation procedures, in this instance the Government would be unable to justify derogation. Here, the Government cannot show that the denial of a competent tribunal to Mr. Hamdi is "strictly required by the exigencies of the situation," does not discriminate, and is consistent with the derogating power's other obligations under international law. *See* ICCPR art. 4(1).[28]

It is not enough that summary detention without review is within the reasonable range of responses to the situation; the situation must make derogation imperative. *See* General Comment No. 29, para. 5 (stating that derogating parties must show not only that the exigencies "justify" derogation, but that they "require" it). Rather, such a denial of process must survive at least the rigorous review recognized by U.S. due process, *see Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976), and the law of other states, *see, e.g., Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, A.C. 97, 111 (P.C. 1996) (stating that

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[27] European and American courts agree. *See Winterwerp v. The Netherlands*, 33 Eur. Ct. H.R. (ser. A) para. 39 (1979) ("In a democratic society subscribing to the rule of law . . . no detention that is arbitrary can ever be regarded as lawful.") (footnote omitted) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3)); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (stating that arbitrary detention violates the laws of war).

[28] The European Convention for the Protection of Human Rights and Fundamental Freedoms employs the same standard for derogating from its obligations, including the protection of the right to be free from arbitrary detention under Article 5(3). *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 15 ("ECHR") (requiring derogation only when it is strictly required by the exigencies of the situation).

"the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorize administrative detention for unreasonable periods or in unreasonable circumstances").

The Government cannot demonstrate that exigencies require the denial of a competent tribunal to provide Mr. Hamdi with a meaningful opportunity to challenge the basis of his detention. *First*, affording Mr. Hamdi the opportunity to present testimony would not, as the Court of Appeals for the Fourth Circuit suggests, "require an excavation of facts buried under the rubble of war." *Hamdi*, 316 F.3d at 471.[29] Instead, it would require a competent tribunal to review that testimony, likely in one sitting. *Second*, permitting a competent tribunal to determine Mr. Hamdi's status, as opposed to detaining him for over two years and possibly indefinitely without status under international law, runs no risk for the Government, whose "major combat activities" in Afghanistan have ended. *Rumsfeld Declares Major Combat Over in Afghanistan*, FoxNews.com, (May 1, 2003), *at* http://www.foxnews.com/story/ 0,2933, 85688, 00.html.[30] And even if the Government had shown that at one time the exigencies of the situation strictly required Mr.

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[29] For example, U.S. allies in the European Parliament have called for proper GPW Article 5 tribunals to determine the status of the detainees being held by the United States Government at Guantanamo Bay, Cuba. *See Euro MPs Seek Tribunals to Determine Cuba Prisoners' Status*, Agency France Press (Feb. 17, 2002), *available at* 2002 WL 2335140.

[30] The Government's recent prosecution of John Walker Lindh also casts doubt on the strategic necessity of denying Mr. Hamdi an opportunity to challenge the basis of his detention. The circumstances surrounding the capture of Mr. Hamdi and Lindh are strikingly similar: both are United States citizens who were seized by Northern Alliance forces in the Fall of 2001 while taking up arms on behalf of the Taliban. *See Hamdi*, 316 F.3d at 460; *United States v. Lindh*, 227 F. Supp. 2d 565, 567-69 (E.D. Va. 2002). But unlike Mr. Hamdi, Lindh attended a terrorist training camp associated with, and funded by, al Qaeda, and he personally met with Usama bin Laden. *See Lindh*, 227 F. Supp. 2d at 567-68. The fact that the Government began prosecuting Lindh in an Article III court while major combat activities continued in Afghanistan severely undercuts any potential argument that the "exigencies of the situation" have justified the Government's disregard of international law with respect to Mr. Hamdi's rights for over the past two years.

Hamdi's arbitrary detention, that detention now has exceeded its permissible length.[31]

III. THE GOVERNMENT'S ASSERTION THAT IT CAN DISREGARD MANDATES OF INTERNATIONAL LAW CONFLICTS WITH THE COURT'S TRADITIONAL RELIANCE ON SUCH LAW WHEN DEFINING THE SCOPE OF THE GOVERNMENT'S WARTIME DETENTION POWERS AND INDIVIDUAL RIGHTS.

Based on the Court's traditional consideration of international law, when interpreting the scope of Executive detention powers and individual rights, the Government cannot ignore international law's requirements regarding Mr. Hamdi's detention. Yet the Government's reliance on Executive branch powers under Article II of the Constitution and Congress' Authorization for Use of Military Force ("Joint Resolution")[32] to support Mr. Hamdi's arbitrary detention is inconsistent with both

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[31] The ICCPR makes clear that states derogating from it must only do so temporarily. *See* General Comment No. 29, para. 1 ("[Article 4] . . . allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can be secured must be the predominant objective of a State party derogating from the Covenant."). General Comment No. 29 further clarifies that derogation and its practical consequences must be strictly required by the emergency situation. *See id.* para. 4 ("This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency."); Robert Kogod Goldman, *POWs or Unlawful Combatants? September 11 and Its Aftermath*, Crimes of War Project, Expert Analysis (Jan. 2002), *at* http://www.crimesofwar.org/ expert/ pow-goldman.html (arguing that Taliban are the armed force of Afghanistan and therefore protected under Article 4(1) of the GPW).

[32] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) The Joint Resolution provides in pertinent part:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

U.S. and international law. *See* Br. in Opp'n to Pet. for Cert. at 14-17.

In determining the scope of the Government's constitutional powers as well as the scope of individual rights, this Court frequently has looked to international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900).[33]

Reviewing the scope of wartime detention powers granted to the Executive by Article II, this Court referred to international law for help in determining what procedural protections must be afforded to those captured and held as "enemy belligerents." *Ex parte Quirin*, 317 U.S. at 31. When considering whether the acts charged constituted an offense against the law of war, this Court consulted various sources of domestic *and* international law to determine the scope of the Executive's detention powers. *Id.* at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.") (citing and quoting foreign military manuals and other texts).[34]

Likewise, in *Ex parte Milligan*, the Court cited the practices of foreign governments in support of its holding that the Executive lacked constitutional power to subject civilians to

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[33] Customary international law has long been embedded into American common law. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.") (Wilson, J., seriatim); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("This is so palpable a violation of our own law … of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since … ").

[34] Similarly, in determining whether a German national convicted by a U.S. military commission could pursue habeas relief, the Court extensively reviewed the then-relevant rules of international law to ensure that they would not be violated by its decision. *See Johnson v. Eisentrager*, 339 U.S. 763, 785-88 (1950); *id.* at 785 (noting "[t]he practice of every modern government"); *id.* at 786 (citing treaty law); *id.* at 787-88 (citing Hague Regulations and secondary sources on international law).

military courts-martial where the civil administration was not deposed and its courts were open. 71 U.S. (4 Wall.) 2, 38-40 (1866) (discussing power of English and French monarchs to impose courts-martial upon subjects). In turning its back on the demands of international law, the Government is violating the clear precepts of American jurisprudence enunciated by the Court.[35]

Similarly, the Government must enforce the Joint Resolution consistently with international law and avoid a construction of the Joint Resolution, or any other congressional act, that would violate international law "if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Accordingly, courts will not interpret a statute to supercede international law absent a clear showing that Congress intended for the statute to do so. *See* Restatement (Third) § 114.

The Joint Resolution generally empowers the Executive to use "all necessary and appropriate force" against those nations, organizations, or persons responsible for the September 11th terrorist attacks, or those persons that harbored such organizations or persons, in order to prevent future terrorist attacks against the United States. However, it never expressly authorizes the Executive to detain Mr. Hamdi (or others) as an "enemy combatant" without the opportunity to challenge the basis of his detention. Therefore, to the extent that Mr. Hamdi's detention is inconsistent with international law, the Joint Resolution cannot be interpreted to authorize his detention without a meaningful opportunity to challenge the basis of his detention.[36]

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[35] During the Vietnam War, the U.S. Military Court of Appeals ruled that, exceeding his orders, a U.S. Marines lance corporal's forced entry into a Vietnamese home with the intent to summarily execute its inhabitants "is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare." *United States v. Schultz*, 39 C.M.R. 133, 136 (C.M.A. 1969).

[36] Because the Government cannot interpret the Joint Resolution to authorize the detention of Mr. Hamdi expressly or implicitly, the authority of the President, when detaining Mr. Hamdi, is not "at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Executive's authority is "at its maximum," when he acts "pursuant to an express or implied authorization of Congress").

Moreover, when interpreting the scope of certain constitutional rights, this Court also has considered foreign precedent and treaty law.[37] Specifically, the Court has considered foreign precedent when discussing the right to engage in sodomy in the privacy of one's home,[38] the history of assisted-suicide law,[39] the application of the Eighth Amendment to the

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[37] The U.S. Supreme Court has "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting). Federal appellate courts have shown a similar tendency to draw support from international sources. *See, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (citing opinions of courts from Canada and the United Kingdom, both of which were signatories to the Hague Convention, to support its restrictive reading of the Hague Convention's implementing legislation); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (same) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories.").

[38] In *Lawrence v. Texas*, the Court recently considered the constitutionality of a Texas statute criminalizing certain intimate sexual conduct between two persons of the same sex. 123 S. Ct. 2472 (2003). Finding that the statute violated the Due Process Clause of the Fourteenth Amendment, the Court overruled its earlier holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court cited foreign precedent, including opinions from the European Court of Human Rights and a report from an advisory committee to the British Parliament, to undermine the finding in *Bowers* that the right to consensual sodomy in the privacy of one's home is "insubstantial in our Western civilization." 123 S. Ct. at 2481 (citing The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963) and *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at para. 52 (1981)).

[39] In *Washington v. Glucksberg*, petitioners sought a declaratory judgment that a Washington state statute banning assisted suicide violated the Due Process Clause of the Fourteenth Amendment. 521 U.S. 702 (1997). In holding that the statute was Constitutional, the Court supported its opinion by tracing the history of assisted-suicide law in the U.S. *and* abroad. *Id.* at 718 n.16 (citing and discussing recent cases and reports from Canada, the United Kingdom, New Zealand, Australia, and Colombia).

death penalty,[40] and the conflict between campaign finance laws and the First Amendment.[41] Last term, Justices Breyer and Ginsburg also discussed the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty ratified by the U.S., as support for the Court's observation that affirmative action programs "must have a logical end point." *Grutter*, 539 U.S. at 306 (Ginsburg, J., concurring) (framing the extent to which admissions programs at the University of

[40] Reliance on the practices of foreign governments is particularly recurrent in cases interpreting the Eighth Amendment. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Enmund v. Florida*, 458 U.S. 782, 796-97 & n.22 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (observing that only three of sixty nations surveyed in 1965 retained the death penalty for rape); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (noting that only two of eighty-four countries surveyed imposed denationalization as a penalty for desertion); *see also Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting) (finding that "three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties"). Justice Breyer has relied on foreign precedent to interpret the Eighth Amendment. *See Knight*, 528 U.S. 990 (Breyer, J., dissenting) (citing and discussing precedent from India, Zimbabwe, Canada, and the European Court of Human Rights) ("A growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that the lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.") (citing *Pratt v. Attorney Gen. for Jamaica*, [1994] 2 A.C.U.K. 1, 18, 4 All E.R. 769, 773, 1993 WL 963003 (P.C. 1993)); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting) ("British jurists have suggested that the Bill of Rights of 1689, a document relevant to the interpretation of our own Constitution, may forbid, as cruel and unusual, significantly lesser delays.") (citing *Riley v. Attorney Gen. of Jamaica*, [1983] 1 App. Cas. 719, 734-735 (P.C. 1982) (Lord Scarman, dissenting)).

[41] In *Nixon v. Shrink Missouri Government PAC*, Justice Breyer cited foreign precedent to support the majority's decision to not adopt a "strict scrutiny" standard when ruling on whether campaign finance laws violate the First Amendment. 528 U.S. 377, 403 (2000) (Breyer, J., concurring). After detailing the Court's historical practice of deferring to "empirical legislative judgments" where the "legislature has significantly greater institutional expertise" and the statute in question "significantly implicates competing constitutionally protected interests in complex ways," Justice Breyer cited opinions from Canadian and U.K. courts as further support. *Id.* at 402-3 ("The approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems.").

Michigan may consider race, in part, by observing the "international understanding of the office of affirmative action").[42]

IV. THE GOVERNMENT'S DETENTION OF MR. HAMDI IS INCONSISTENT WITH ITS STRONG CONDEMNATION OF ARBITRARY DETENTION AND PROMOTION OF THE RULE OF LAW WORLDWIDE.

The rule of law is only as strong as a government's adherence to it. The rule of law depends not only upon the

[42] The United Nations Human Rights Committee and several international legal scholars have noted that detentions justified under domestic law nevertheless may be arbitrary and unlawful under international law. *See* U.N. Human Rights Committee, Comm. No. 560/1993, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997) (stating that ICCPR Art. 9(5) prescribes payment of compensation for detentions that are permissible under domestic law but contrary to the ICCPR); Sarah Joseph et al., *The International Covenant On Civil and Political Rights: Cases, Materials, and Commentary* 241 (2000) (noting that ICCPR sanctions "lawful yet arbitrary detentions"). Similarly, the United Nations as well as the Universal Declaration on Human Rights and the Restatement (Third) have stated that detentions pursuant to procedures established by domestic law do not foreclose a determination that such detention is "arbitrary." *See* United Nations, Study of The Right of Everyone To Be Free From Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, at 7 (1964) ("An arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person."). Article 9 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." During the drafting of the Universal Declaration, a delegate from the United Kingdom emphasized the importance of adding "arbitrary" to Article 9 stating that "[t]he article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." U.N. 3 GAOR, Pt. I, 3rd Comm. 247, 248 (1948); Restatement (Third) § 702 cmt. h (stating that detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (internal quotations and citation omitted). Thus, if the existing U.S. law (*e.g.*, Article II and the Joint Resolution) that purportedly authorizes Mr. Hamdi's detention were arbitrary under international law, that detention may nevertheless be characterized as unjust.

independence of a judiciary, but also upon the Executive branch's commitment to law enforcement and the principles that the enforcement of those laws is aimed to preserve. Thus, in the context of international and domestic human rights and humanitarian law, the Government must enforce not only the law but also the principles of human dignity.[43]

By detaining Mr. Hamdi outside the law for over two years without either the opportunity to present testimony to refute the basis of his detention or meaningful access to counsel, the Government is engaging in the very practice of arbitrary detention that it has condemned worldwide for decades. In statements to Congress and to the United Nations, United States government officials recently and repeatedly have singled out the practice of arbitrary detention by other countries, such as Afghanistan,[44] Cuba,[45] the Democratic Republic of Congo,[46]

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[43] *See* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 531 (2003) ("Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.").

[44] Secretary of Defense Donald Rumsfeld testified before Congress in 2002 on the positive impact that U.S. intervention has had on Afghanistan. Quoting from an Amnesty International report, Secretary Rumsfeld stated that in 2001 "Afghans suffered pervasive 'human rights abuses, including arbitrary detention . . . .'" Hearing to Review Testimony on Operation Enduring Freedom Before the Senate Comm. on Armed Services, 107th Cong. (July 31, 2002) (statement of Hon. Donald Rumsfeld, Sec. of Defense), *available at* http://www.senate.gov/~armed_ services/statemnt/2002/July/Rumsfeld2pdf.

[45] *See, e.g.*, Hearing Regarding U.S.-Cuba Economic Relations Before Senate Comm. of Finance, 107th Cong. (Sept. 4, 2003) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs, before the Senate Finance Committee), *available at* http://finance.senate.gov/hearings/ testimony/2003test/090403altest.pdf.

[46] Statement of Harold Hongju Koh, U.S. Assistant Secretary of State, Democracy, Human Rights & Labor, Before the U.N. Commission on Human Rights (Mar. 30, 2000) (stating that "in the Democratic Republic of Congo . . . government and anti-government forces - as well as troops of the governments supporting each side - have committed . . . arbitrary detentions"), *available at* http://usinfo.state.gov/regional/ea/uschina/koh330.htm.

Iran,[47] Iraq,[48] Russia,[49] and Sudan[50] for their practice of arbitrary detention. Also, the House and Senate have passed resolutions urging the People's Republic of China to release Wang Bingzhang and Dr. Yang Jianli, who have been arbitrarily detained. *See* S. Res. 184, 108th Cong. (2003) (resolving that Dr. Jianli's detention violates Article 9 of the International Covenant on Civil and Political Rights and Article 9 of the Universal Declaration of Human Rights); H. Con. Res. 326, 108th Cong. (2003); Press Release, Senator Jon Kyl, Senate Passes Kyl-Mikulski Resolution to Free U.S. Resident Held in China Since 2002 Dr. Yang Jianli Detained in China for Pro-Democracy Views (July 30, 2003), *available at* 2003 WL 11710378. The force of this position is severely diluted when

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[47] Statement of Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, on Human Rights Situations and Reports before U.N. General Assembly, Third Comm. (Social, Humanitarian and Cultural) (Nov. 28, 1995), *available at* http://dosfan.lib.uic.edu/ERC/intlorg/ press_releases/951128.html.

[48] While U.S. soldiers were marching to Baghdad, Secretary of State Colin Powell, referring to the State Department's 2002 Iraq Country Report, decried the fact that Iraqi "authorities routinely used arbitrary arrest and detention, prolonged detention, and incommunicado detention, and continued to deny citizens the basic right to due process." U.S. Department of State's Annual Human Rights Report (Mar. 31, 2003), in U.S. Department of State Press Release, State Department Report Outlines Human Rights Abuses in Iraq-Powell Cites Saddam's Regime as Great Threat to Global Peace, Stability, *available at* 2003 WL 2047088.

[49] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Before a Helsinki Commission hearing on Sept. 9, 2003, in U.S. Department of State Press Release, Lorne Craner Testimony at Sept. 9 Helsinki Commission Hearing, *available at* 2003 WL 2050164 (Sept. 10, 2003).

[50] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Hearing on a Review of the State Department Country Reports on Human Rights Practices, Before the House Subcomm. on Terrorism, Nonproliferation and Human Rights, of the House Comm. on Int'l Relations, *available at* 2003 WL 1998849 (Apr. 30, 2003).

the United States denies fundamental aspects of due process to its own wartime detainees.[51]

As an unjustified violation of international law, the Government's arbitrary detention of Mr. Hamdi also has compromised the United States' concerted effort to promote democracy and the rule of law abroad. Despite the Government's blatant disregard for international law here, the Executive has repeated the case to the American people that the objective of establishing a rule of law in Afghanistan and Iraq underlies the U.S. military – and now nation-building – exercises there. At his first State of the Union Address, President Bush emphasized that "no nation is exempt from" the defense of liberty and justice. 2002 State of the Union Address.[52] The President enunciated similar objectives for the invasion of Iraq last year: "As we press on to liberate every corner of Iraq, . . . [w]e'll help the Iraqi people to establish a just and representative government, which respects human rights and adheres to the rule of law." President George W. Bush, Remarks on Iraq from the Rose Garden (Apr. 15, 2003), *available at* http://www.whitehouse.gov/news/release/2003/04/print/20030415-10.html.[53] Enforcing and practicing those policy objectives

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[51] For instance, Russia's arbitrary detentions continue in the face of what Russia has deemed to be terrorist threats from Chechen forces, despite statements from U.S. officials condemning such detentions. *See* Craner Statement, *supra* note 49 (stating that Russia's arbitrary detentions "are not consistent with international humanitarian law or Russia's OSCE and international human rights commitments").

[52] Punctuated by applause from both sides of the House chamber, the President further stated: "America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance." 2002 State of the Union Address ("[W]e have a greater objective than eliminating threats and containing resentment. We seek a just and peaceful world beyond the war on terror.").

[53] "Our support for human rights policy in a positive way to create better human rights conditions around the world, our honest and forthright human rights reports: all of these things have continued. And they've continued alongside as part of our policy on terrorism." State Department Spokesman Richard Boucher, *in* U.S. Department of State Press Release, *Transcript: State Department Noon Briefing, May 29, 2003, available at* 2003 WL 2048222 (May 29, 2003).

have secured the fair treatment of our own men and women captured on the field of battle and have paved the way for a more stable and humane world.

CONCLUSION

Amicus, Global Rights, respectfully urges the Court to reverse the decision below to hold not only the United States to its commitments under international law, but to preserve the long-standing regime of human rights law that has protected scores of individuals from arbitrary caprice and Executive whim.

Respectfully submitted,

JAMES F. FITZPATRICK*
**Counsel of Record*
KATHLEEN A. BEHAN
JOSHUA A. LEVY
LESLIE M. HILL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

GAY L. MCDOUGALL
MARK BROMLEY
GLOBAL RIGHTS
1200 18th Street, N.W.
Suite 602
Washington, D.C. 20036
(202) 822-4600

Counsel for Amicus Curiae

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(4)

No. 03-6696

In the Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI
Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CERTAIN FORMER PRISONERS OF WAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PHILIP ALLEN LACOVARA
Counsel of Record
ANDREW J. PINCUS
ANDREW J. SCHAEFER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1157
(202) 263-3000

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former U.S. soldier prisoners of war whose lives have been deeply affected by our enemies' compliance, or failure to comply, with the mandates of the Geneva Conventions.

Amici take no position on whether petitioner Hamdi ("Petitioner") has committed acts that warrant treatment as an enemy combatant.[2] Nevertheless, they file this brief to urge this Court to examine and reverse the Fourth Circuit's refusal to allow a U.S. citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions.

Douglas "Pete" Peterson served as a fighter pilot and commander in the U.S. Air Force from 1954-1981 and attained the rank of full colonel. In 1966, he was shot down over North Vietnam and spent six and a half years as a prisoner of war. From 1997-2002, Mr. Peterson served as U.S. Ambassador to Vietnam. Prior to his ambassadorship, he served three terms as a U.S. Congressman.

Leslie H. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families. When his B-17 bomber crashed on April 24, 1944, Mr. Jackson was captured by the German Army and transferred to a converted concentration camp. While the experience was harsh, Mr. Jackson's

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* use the term "enemy combatant" to mean a member of the armed forces of a nation with which the United States is at war.

captors treated him in accord with the Geneva Conventions of 1929. Mr. Jackson believes that his survival and health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Edward Jackfert and Paul Reuter offer a sharp contrast. Mr. Jackfert is former National Commander of American Defenders for Bataan & Corregidor, Inc. ("American Defenders"), an organization providing support for prisoners of war held by the Japanese during World War II. Mr. Reuter is the National Adjutant and Legislative Officer for the American Defenders. In 1942, both men were taken prisoner by Japan, which did not purport to follow the 1929 Geneva Conventions. Mr. Reuter was forced to take part in the horrific Bataan Death March; Mr. Jackfert, similarly, was subject to a mass transportation of Allied prisoners of war via a "hell ship" from the Philippines to Japan. Each man was forced into slave labor. During their years of captivity, they saw their compatriots starved, beaten and killed.

SUMMARY OF ARGUMENT

For decades the United States has endeavored to ensure the safety and well-being of its citizens when they are captured by hostile forces. Those efforts are now at risk. The issue is whether an American citizen, apparently captured on a field of battle, may be denied by his own country the protections long accorded to those taken prisoner by the United States in wartime, without running afoul of our obligations under the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"). Failure to abide by the terms of the Geneva Conventions in this case not only deprives Petitioner of the rights to which he is entitled, it increases the likelihood that other nations will fail to follow Convention protections in the treatment of Americans taken prisoner overseas.

Petitioner was captured by Northern Alliance forces during fighting in Afghanistan, and was later turned over to the United States military for detention. The United States declined to designate Petitioner a "prisoner of war" or to extend to Petitioner the full rights due to POWs under international law, including access to a "competent tribunal" to determine his status. Instead, Petitioner has been detained indefinitely, virtually incommunicado, deprived even of the opportunity to challenge the particulars of his designation as a combatant.

Merely branding a detainee a "terrorist" does not place the person in a lawless twilight zone unprotected by either the criminal justice system or the laws of war. Indeed, the government has never even asserted that Petitioner is a "terrorist." He was captured on a battlefield. This is enough to give him the presumptive status of a POW, with all of the rights and protections accorded that status, unless and until a "competent tribunal" established under the GPW finds that he is not entitled to this status.

Unless the federal courts exercise their authority to review the lawfulness of Petitioner's detention and his right to be treated as a POW under the international treaty to which the United States is bound, Petitioner's treatment will establish a precedent that jeopardizes the safety of all Americans who may find themselves taken prisoner in the course of armed conflict.

Americans troops are regularly dispatched on a wide variety of missions throughout the world. Despite our nation's best efforts, some of these troops eventually will face hostile situations and some may be captured, as has happened in the last decade alone in such disparate theaters as Serbia, Iraq, Somalia and China. American civilians travel throughout the world and may also find themselves taken prisoner by our country's enemies. It is unquestionably in our national interest that captured Americans be provided the full protections to which they are entitled under international law. Our gov-

ernment's failure to abide by our obligations under the Geneva Convention seriously undermines this national interest.

Amici accordingly urge this Court to reverse the decision of the U.S. Court of Appeals for the Fourth Circuit, and to enforce the United States' binding obligation to abide by the Geneva Convention.

ARGUMENT

I. The Geneva Conventions Protect all Parties to Conflict, as the United States has Repeatedly Affirmed, and Extend Important Protections to Persons Claiming to Be Prisoners of War.

In the aftermath of World War II, nations throughout the world ratified the four Geneva Conventions. These four conventions grew out of an existing body of humanitarian law, including the 1929 Geneva Conventions offering similar protection, and created a comprehensive code of international law to regulate the conduct of war and, most importantly, to ensure that all persons detained during armed combat – whether combatants or civilians – are afforded significant legal protection. Of particular relevance, Article 3 common to each Convention generally forbids "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ["GPW"], Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 *et seq.*, Art. 3(1)(d).

Because they have been ratified by the United States, the four Geneva Conventions are the supreme law of the land. U.S. Const. Art. VI. The United States has abided by both the spirit and letter of the Conventions in its applicable policies, procedures, and regulations. The United States military, for example, has incorporated language from the GPW into

its military regulations. It also consistently has adhered to the requirements of the GPW in every conflict since World War II. The government, likewise, has publicly affirmed the validity and usefulness of the Conventions whenever Americans abroad have been captured. Such support for the Conventions is due, at least in part, to the recognition that the Conventions help save American lives.

The GPW, in particular, affords captured soldiers both substantive and procedural protections meant to ensure each detainee's safety and dignity, and the GPW's provisions apply broadly. Article 4 of the GPW defines "prisoners of war" to include "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces," together with "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." Furthermore, the GPW recognizes as potential POWs citizens who join armed units when "on the approach of the enemy [they] spontaneously take up arms to resist the invading forces." GPW, art. 4; *see also* Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 648, 756-57 & n.685 (2002) ["*Trials and Tribulations*"] (stressing that argument that Taliban fighters are not POWs is "virtually meritless" and serves to raise "serious dangers for our own soldiers"); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 43-44 (2000) ["*Laws of War*"] (discussing Article 4).

Article 5 of the GPW imposes a presumptive requirement that every alleged combatant be treated as a prisoner of war, with all the protections that flow from that status, unless and until a "competent tribunal" reaches a contrary determination. Thus, all contracting parties, including the United States, must treat those captured in the course of armed conflict as POWs "from the time they fall into the power of the enemy and until their final release and repatriation." GPW,

Art. 5. There is one – and only one – exception to that requirement:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* at 3324 (emphasis added).

Nor is the POW designation merely academic. POW designation governs the manner in which a detained person may be treated and affords POWs many rights to which they otherwise may not be entitled during time of conflict. Under the GPW, for example, a prisoner of war may "only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." GPW, art. 12. POWs must be "humanely treated" and must be protected "against acts of violence or intimidation and against insults and public curiosity." *Id.*, art. 13. POWs are entitled "in all circumstances to respect for their persons and their honor" and shall "retain the full civil capacity which they enjoyed at the time of their capture" to the extent possible. *Id.*, art. 14. Nor may a POW be discriminated against on basis of gender, race, religion, or other such distinction. *Id.*, arts. 14, 16. POWs are required to provide no more that "surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information." *Id.*, art. 17. They cannot be coerced to answer further and may not be "threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind" should they refuse. *Id.*

Moreover, POWs may not be "interned in penitentiaries" unless incarceration is necessary to protect their safety. *Id.*, art. 22. Rather, "[p]risoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area," (*id.*, art. 25), and shall have access to such benefits as the ability to prepare their own meals, (*id.*, art. 26), access to a canteen, (*id.*, art. 28), monthly medical inspections, (*id.*, art. 31), "complete latitude in the exercise of their religious duties," (*id.*, art. 34), and "opportunities for taking physical exercise, including sports and games, and for being out of doors," (*id.*, art. 38). In short, the GPW prohibits contracting parties from treating detainees who are presumed to be POWs as criminals and prohibits the detaining power from confining the detainees in conditions resembling a civilian or military prison.

The United States has recognized the significance of the POW designation in its military regulations and consistently has adhered to these obligations in past military conflicts. The United States Army, for example, has incorporated the GPW directly into its binding regulations on the treatment of wartime detainees:

> "In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*" Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees*

and Other Detainees § 1-6(a) (1997) (emphasis added).[3]

Even those detainees "not appearing to be entitled to prisoner of war status" have the right to assert their claim for determination by a competent tribunal. *Id.* § 1-6(b); *see also* Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (providing that even "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"). The United States regularly has conducted so-called Article 5 hearings to determine whether captured persons should be accorded POW status under the Geneva Conventions. *See, e.g.*, Judge Advocate General's School, OPERATION LAW HANDBOOK 22 at n.2 (O'Brien, ed. 2003) (discussing hearings conducted during first Gulf War); *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 754, 768-75 (1968) (discussing hearings conducted during Vietnam War).

In sum, there is a well-developed set of legal doctrines, based on international treaty obligations, that provide both substantive protections to POWs and the process for determining the right to POW status. Detention that disregards both the substantive protections to which POWs are entitled and the process due for determining claims to that status is clearly unlawful.

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[3] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force and Marine Corps, Washington, D.C., October 1, 1997.

II. Federal Courts May Examine The Lawfulness Of Military Confinement Of Americans Who Claim Prisoner Of War Status[4]

Petitioner, by applying for a writ of habeas corpus, seeks judicial review of the government actions that have led to his confinement both incommunicado and without charge. The writ should issue. Meaningful judicial review is entirely appropriate where the conduct in question, if permitted to stand, would violate the United States' obligations under international law, to the detriment of one of its own citizens. Certainly there can be no argument here that Petitioner's right to the writ can be validly curtailed because he has not yet exhausted other avenues of relief. Petitioner has been afforded no other avenues of review whatsoever.

The writ of habeas corpus has been described as the "highest safeguard of liberty." *Smith v. Bennett*, 365 U.S. 708, 712 (1961) (*quoted in Lonchar v. Thomas*, 517 U.S. 314, 322 (1996)). Dismissal of the writ "denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 325. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 301 (2001) (citing cases); *see also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("the traditional Great Writ was largely a remedy against ex-

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[4] *Amici* recognize that the parties will brief the legal question of whether this Court has jurisdiction to hear this case. *Amici* do not with to repeat those arguments and do not here submit a comprehensive analysis of the applicable law of jurisdiction. Rather, *amici* here illustrate the distinction between past review of applications for the writ of habeas corpus and the circumstances of the instant case.

ecutive detention"). The wrongs for which Petitioner seeks redress go to the heart of the Executive Branch's power to detain Petitioner and, if he may be detained, whether the writ should be available to determine the process that is due to ascertain the legal rights attached to his status as a detainee.

Although Congress has from time to time passed legislation restricting the applicability of the writ, such limitations nevertheless comport with underlying principles of due process. Not surprisingly, Congress has made no attempt to divest the federal courts of their historic power to examine the justification for Executive detention, when – as in this case – no other tribunal, civilian or military, has adjudicated the lawfulness of the detention and the grounds for confinement. Congress' recent efforts to limit access to the writ all presuppose that the applicant for the writ already has enjoyed the benefit of a fair judicial or administrative tribunal that adjudicated the grounds for continued detention. For example, the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996), limits the extent to which a claimant may petition a federal court for a writ of habeas corpus, but nevertheless permits a application once the petitioner has "exhausted the remedies available in the courts of the State" in which he or she is being held, or otherwise was not permitted to exhaust any available state remedies. *See* 28 U.S.C. § 2254(b)(1) (2003); *see also* 28 U.S.C. § 2264(a) (limiting federal court review of applications by capital defendants to those claims that have been "decided on the merits in State courts," subject to exceptions). Likewise, the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996), curtails federal jurisdiction with regard to certain offenses involving aliens. *See, e.g.*, 8 U.S.C. 1252(a)(2)(C) (2003) (forbidding judicial review of final deportation order against an alien found removable for having committed certain enumerated offenses). Again, however, aliens falling under this act's scope are provided administrative remedies by which to

test the lawfulness of their detention. *See, e.g.*, 8 U.S.C. §§ 1225(b), (c) (providing mechanism for review of determination that arriving aliens are deportable).

In the present case, by contrast, Petitioner has been afforded no opportunity to plead his case. Thus the government should not curtail his right to petition for a writ of habeas corpus. The right to have a "competent tribunal" adjudicate Petitioner's claim to POW status under the GPW is clear, yet he has been denied both that right and the means to contest the denial of that status.

This case was filed in the Eastern District of Virginia, where Respondent Secretary of Defense is located. *See Padilla v. Rumsfeld*, 352 F.3d 695, __, 2003 U.S. App. LEXIS 25616,*34-*35 (2nd Cir. 2003) (acknowledging government's argument that Secretary Rumsfeld is "located in the Eastern District of Virginia"). A federal district court with personal jurisdiction over the government representatives responsible for Petitioner's treatment has the power – and the responsibility – to issue a writ of habeas corpus to determine whether the detaining officials have complied with the procedures that the GPW establishes as the governing standard for judging the lawfulness of the detainee's confinement.

As we next discuss, the compelling national interest in protecting Americans taken prisoner by hostile powers provides a powerful justification for concluding that the federal courts have both the authority and the duty to ensure that the United States complies with its obligations under the GPW.

III. Failure To Adhere To The Geneva Conventions Endangers American Troops And Civilians Abroad.

A. The United States Ratified the Geneva Conventions In Part to Protect Our Own Service Members.

The integrity of the Geneva Conventions is crucial to the safety and security of U.S. troops and civilians abroad, as the ratifiers themselves recognized:

> "If the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain." S. Rep. No. 84-9, at 32 (1955) ["Ratifying Report"]

The United States played a "major role both in the preparatory steps and in the conference proceedings" for the Geneva Conventions. *Geneva Conventions of the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess., at 3-4 (1955) ["Senate Hearing"] (statement of Robert Murphy, Deputy Under Secretary of State). Senate debate on the Geneva Conventions makes plain that the Senate's decision to ratify was animated in large part by the belief that American compliance with the Geneva Conventions would encourage our enemies to reciprocate in their treatment of American POWs, civilians, and others.

For example, as Secretary of State John Foster Dulles explained, American "participation is needed to . . . enable us to invoke [the Geneva Conventions] for the protection of our nationals." *See, e.g., id.* at 61. Senator Mike Mansfield

agreed, arguing that while American "standards are already high":

> "The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people . . . ." 101 Cong. Rec. 9960 (July 6, 1955).

B. The United States Government's Strict Adherence to the Principles and Requirements of the Geneva Conventions Has Helped Save American Lives in Earlier Conflicts.

Reciprocity – the expectation that acting in a humanitarian manner may encourage one's enemy to do the same – remains "a powerful actual factor" in the application of international humanitarian law. Michel Veuthey, *The American Red Cross-Washington College of Law Conference*, 33 AM. U.L. REV. 83, 89 (1983). Treating those captured in a war zone, such as Petitioner, in accordance with basic shared standards means that our own captured forces stand a much better chance of surviving captivity unharmed. Ignoring that reality not only contravenes the plain text of the GPW, but also places Americans around the world at grave risk of precisely the type of mistreatment the Geneva Conventions aim to prevent.

1. The enlightened self-interest behind ratification of the Geneva Conventions has proven effective in conflicts preceding the "war on terrorism." Thousands of Americans were taken prisoner during the Vietnam War. Even though North Vietnam publicly asserted that all American POWs were war criminals, and hence not entitled to the protections of the GPW, (*Laws of War* at 62 n.100), the United States applied the Geneva Conventions' principles to all enemy POWs – both North Vietnamese regulars and Viet Cong – in part to try to ensure "reciprocal benefits for American

captives." Maj. Gen. George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964-73, at 63 (Dep't of the Army 1975); *see also* 64 DEP'T OF STATE BULL. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's call for application of the 1949 Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam and elsewhere in Southeast Asia"); *Note, Safeguarding the Enemy Within*, 71 FORDHAM L. REV. 2565, 2574 (2003) (noting U.S. Army's establishment of widespread Article 5 tribunals in Vietnam to adjudicate POW status of enemy detainees).

Former Vietnam POWs, and others, assert to this day that the United States government's adherence to the principles of the Geneva Conventions helped protect them. As Senator (and ex-POW) John McCain explained on the fiftieth anniversary of the Geneva Conventions:

> "The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions . . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war."[5]

Others likewise assert that the American adherence to the Geneva Conventions in Vietnam saved American lives:

[5] Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http:/www.senate.gov/~mccain/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=820.

> "[A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that]." Col. Fred L. Borch, *Review of Honor Bound*, 163 MIL. L. REV. 150, 152 (2000).

George H. Aldrich was the State Department lawyer responsible for applying international humanitarian law during the Vietnam War, and was also Secretary of State Kissinger's legal advisor for the negotiation of the 1973 peace agreement between the United States and North Vietnam. *Laws of War*, at 62 n.99. He has noted:

> "My experience with the law in the Vietnam War and my subsequent thoughts about it have convinced me that, whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state – whether at the invitation of that state's government or of the rebel party – the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts. *Id.* at 62.

The Vietnam experience demonstrated to American authorities, who were "painfully aware of the experiences in Korea and Vietnam," the benefits to Americans of full compliance with the Geneva Conventions. George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 898 (2002) ("[I]t would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan [as of September 11, 2001] should, upon capture, be treated as POWs. This is what we did in Vietnam, where we found it desirable to give virtually all enemy prisoners POW status.").

Although Vietnam-era statements regarding the importance of the Geneva Conventions are common, they are hardly unique. On the contrary, since World War II the United States has repeatedly reaffirmed the importance of the Conventions, in general, and of the GPW, in particular. General Eisenhower, for example, pointedly explained that the Western Allies treated German prisoners in accordance with the principles of international humanitarian law because "the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing." Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1949).

Similarly, during the Korean War the "moral acceptance of the conventions as a general norm did have some effect" on both American and North Korean treatment of POWs, even though neither side had then ratified the GPW. Senate Hearing, at 5 (statement of Deputy Under Secretary of State Murphy); *see also* Ratifying Report, at 31 (noting that while "the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized norms, . . . without the convention, that treatment could have been still worse").

The United States government's allegiance to the principles enshrined in the Geneva Conventions has continued even in our most modern conflicts. During the 1991 Gulf War, the United States armed forces readily afforded full protection under the Geneva Conventions to the more than 86,000 Iraqi POWs in its custody. Dep't of Defense News Transcript, *Briefing on Geneva Convention, EPW's and War Crimes* (Apr. 7, 2003). Almost 1,200 Article 5 hearings were conducted, resulting in 886 prisoners being determined to be civilians. Department of Defense, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 578 (1992).

During the present conflict in Iraq, the government has stressed that it "believes in the principles and in the law of the Geneva Convention," and that "America's values . . are reflected in the Convention." White House Release, *Statement by the Press Secretary on the Geneva Convention* (May 7, 2003). Dozens of Article 5 tribunals were convened within the first two months of the 2003 Iraq War. Department of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

It is thus unsurprising that contemporary experts have embraced this same lesson of U.S. history in wartime: treating one's enemy in accordance with the Geneva Convention encourages like protection of one's own captured troops. Steve Levin, *International Law Often a Casualty*, PITTSBURGH POST-GAZETTE, Mar. 25, 2003, at A-9 (noting Prof. Jules Lobel's statement that it "is in every country's interest to treat prisoners in accordance with the Geneva Convention because soldiers in your army could be taken prisoner, too"); Frank Davies, *U.S. Policy May Dilute Protection of POWs*, SAN JOSE MERCURY NEWS, Mar. 25, 2003, at A-7 (comment by Eugene Fidell, director of National Institute of Military Justice, that showing Iraqi POWs in U.S. media "really complicates matters when you're trying to build a case about the treatment of your own POWs"); *see also* John Cloud, *What's Fair in War?*, TIME, Apr. 7, 2003, at 66 (arguing that U.S.

should apply GPW in Iraq because "it is that very document that could help those young American captives get home safe").

2. In addition to upholding the principles of the Geneva Conventions itself, the United States routinely demands that foreign parties do the same. Often the United States makes such demands for the stated purpose of protecting Americans abroad. For example, after American soldiers were captured during the 2003 Iraq War and abused, the United States condemned Iraqi treatment of American POWs as violating the GPW and contrasted it to the United States' own treatment of prisoners it has taken. President Bush demanded that American POWs in Iraq "be treated humanely . . . just like we're treating the prisoners that we have captured humanely." White House Release, *President Discusses Military Operation* (Mar. 23, 2003). Deputy Secretary of Defense Wolfowitz likewise invoked the Geneva Conventions when objecting to Iraqi treatment of U.S. POWs: "We've seen those scenes on Al Jazeera that others have seen. We have reminded the Iraqis . . . that there are very clear obligations under the Geneva Convention to treat prisoners humanely . . . . We treat our own prisoners, and there are hundreds of Iraqi prisoners, extremely well." Dep't of Defense News Transcript, *Deputy Secretary Wolfowitz Interview with New England Cable News* (Mar. 23, 2003).

Similarly, when American soldiers were taken prisoner during NATO military action against Serbia in 1999 and quickly shown on Serbian television beaten and humiliated, the United States immediately demanded that these soldiers be treated as prisoners of war under the Geneva Convention; moreover, the Department of Defense was quick to contrast Serbia's mistreatment of American POWs with the humane treatment afforded Serbian POWs under the Geneva Convention. Steven Lee Myers, *Serb Officer, Captured by Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A9.

The United States has demanded that American POWs be treated in conformance with the Geneva Conventions even in situations where the GPW may not have been applicable. In 1993 in Somalia, for example, an American and a Nigerian soldier were both captured by forces loyal to warlord Mohammad Farah Aideed while part of a humanitarian mission to that devastated region. Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. TIMES, Oct. 8, 1993, at A16 ["*Refuses to Exchange*"]. International observers generally agreed that, at the time of the capture, Somalia had no functioning government, meaning that there was no "state" party obligated to treat the captured American and Nigerian in accordance with the GPW. See Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARV. INT'L L. J 301, 310 (Winter 2003). Nevertheless, the United States not only demanded that these two soldiers be treated in accordance with the Geneva Conventions, but further stressed that those Somali fighters captured by the United States – neither American, nor fighting on behalf of an organized government – would be treated as prisoners of war under the Geneva Convention. *See Refuses to Exchange, id.*; *see also Note: The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. LAW 871, 891 & n.177 (1998) ("The factions at war in Somalia were not trained soldiers. Instead, '[t]he typical Somali fighter [was viewed] as an [u]ntrained, undisciplined teen-ager with a contraband weapon and no field support or political allegiance.") (internal citations omitted). Petitioner is entitled to, and should receive, no less.

3. It is only in the context of more recent efforts to combat terrorism that the Executive Branch appears to have lost sight of both its legal obligations and the long-range interests of our own troops and citizens. Within months of the September 11 attacks, Secretary of State Colin Powell, retired U.S. Army General and former Chairman of the Joint

Chiefs of Staff, recognized that the Geneva Conventions applied to Al Qaeda and Taliban fighters captured in Afghanistan, and he declared that those captured fighters would have the opportunity to have their status adjudicated by a competent tribunal, as required by the GPW. Rowan Scarborough, *Powell Wants Detainees to be Declared POWs*, WASH. TIMES, Jan. 26, 2002, at A1; Katharine Q. Seelye, *Powell Asks Bush to Review Stand on War Captives*, N.Y. TIMES, Jan. 27, 2002, at A1; *see also* Andrew Stephen, *NS Profile: Colin Powell*, NEW STATESMAN, Dec. 16, 2002, *passim* (discussing Secretary Powell's military career). Why the government has failed to observe these obligations in the instant case remains unclear. Regardless, it disserves the interests of American troops and civilians who will find themselves seized by hostile forces in the future.

Moreover, the interests of American citizens caught up in hostilities extend beyond military combatants. Like the GPW, the fourth of the Geneva Conventions, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3356, 75 U.N.T.S. 287 ["Fourth Convention"], confers upon non-combatants various substantive and procedural protections designed to check a detaining power's mistakes. Although the Fourth Convention recognizes that it may be possible for a nation's security to be so threatened that it may validly suspend full application of the rights of the Fourth Convention to a given civilian, the Fourth Convention nevertheless emphasizes that any such suspension is temporary: "[S]uch persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention." *Id.*, art. 5.

The court below held that the Convention rights of anyone apprehended in a war zone, whether soldier or civilian, may be protected only by diplomatic intervention from the apprehended person's own country – whether or not that country is the detaining power. *Hamdi v. Rumsfeld*, 316 F.3d

450, 468-69 (4th Cir. 2003) [hereinafter *Hamdi III*]. As Judge Luttig warned, however, this interpretation has dire consequences:

> "The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state." *Hamdi v. Rumsfeld*, 337 F.3d 335, 358 (4th Cir. 2003) (Luttig, J., dissenting).

Thus, if a hostile power chooses to follow the lead of the American government in this case, these unwitting detainees may find themselves held without charge, for an indefinite period of time. Indeed, the government's position even extends to civilians seized by our forces and declared "terrorist supporters." As Judge Motz pointed out, the ruling below would mean that "any American citizen" seized in a part of the world where American troops are present . . . could be imprisoned indefinitely . . . if the Executive asserted that the area was a zone of active combat." *Id.* at 372 n.3 (Motz, J., dissenting).

C. Discarding the Principles Embodied in the Geneva Conventions Encourages Others to Do the Same, to the Detriment of International Law.

These concerns about the welfare of Americans abroad are hardly academic. The United States has a vested interest in following both the letter and the spirit of the Geneva Conventions in order to avoid taking any steps that would encourage other nations to discard the Conventions' principles.

The Defense Department's clear departure from its established practice in its treatment of Petitioner and others similarly situated not only lowers the bar for its own conduct, it

encourages authoritarian regimes around the globe to commit abuses in the name of counter-terrorism.

Even before September 11, 2001, the United States recognized the threat extrajudicial practices posed to Americans abroad. The United States, for example, objected to the military trial of American Lori Berenson, detained by Peruvian authorities on charges of terrorism; the United States deplored the relative lack of due process safeguards afforded Ms. Berenson under the military trial procedure. *Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong., 1st Sess., at 2001 WL 26187921 (Nov. 28, 2001) (testimony of Scott L. Silliman, Professor of Law) ("There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President's military order [regarding enemy combatants seized in Afghanistan], and I believe this opens us up to a charge of hypocrisy from the international community."); *see also Tribunals and Tribulations*, at 759 n.695 (providing State Department's 1999 description of deficiencies in Peru's military trials).

Since September 11, 2001, these concerns have multiplied. The following regimes, among others, have acted to suppress lawful dissent and quell political opposition, all the while self-consciously invoking the very language the United States has used in justifying its treatment of individuals such as Petitioner: Egypt (where President Mubarak endorsed a diminished post-September 11 concept of the "freedom of the individual"); Liberia (where then-President Taylor ordered a critical journalist declared an "enemy combatant," jailed, and tortured); Zimbabwe (where President Mugabe, while voicing agreement with the Bush Administration's policies in the war on terror, declared foreign journalists and others critical of his regime "terrorists" and suppressed their work); Eritrea (where the governing party arrested 11 political opponents, has held them incommunicado and without charge, and defended its actions as being consistent with United States actions after September 11); and China (where the Chinese government charged a peaceful political activist with terrorism and sentenced him to life in prison; the U.S. State Department noted "with particular concern the charge of terrorism in this case, given the apparent lack of evidence [and] due process"). See Lawyers Committee for Human Rights, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, at 77-80 (Fiona Doherty & Deborah Pearlstein, eds. 2003).

Regardless whether these regimes are currently at peace with the United States, the time may come when their nations become hostile ground. Americans some day may be captured or detained in these locations as a result of actions arising out of, or incident to, military operations. The Defense Department's decision to deny Petitioner access to a competent tribunal to adjudicate his case will only serve to harm the future interests of Americans in these countries and around the world. Although the court below erred in rejecting the applicability of the Geneva Conventions, the court correctly noted the Conventions' purpose:

> "There is a powerful and self-regulating national interest in observing the strictures of the [Geneva] Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance." *Hamdi III*, at 469.

Reciprocity is as important now as it was when the Geneva Conventions were created over fifty years ago. American servicemembers can proudly serve their country knowing that their country has fought, tooth and nail, to ensure that the Conventions protect them. When the United States departs from its established practice, rejects those aspects of the Conventions that it believes to be too burdensome or incon-

venient – and thereby encourages less noble actors to do the same – innocent Americans may ultimately pay the price.

* * * * * *

The question presently facing this Court is a momentous one. Two and one-half years after his capture, Petitioner languishes in a jail cell, virtually incommunicado, neither charged with, nor tried for, nor convicted of any crime. Petitioner has been deprived of any opportunity to challenge the denial of his POW status. The Defense Department insists that no charge or hearing is necessary and intimates that none may be forthcoming. Petitioner's American citizenship apparently is treated as irrelevant. Such conduct represents a radical departure from this nation's traditions. If allowed to stand, it would cause lasting damage not only to Petitioner, but to all Americans worldwide, now and in the future, who may some day be captured or detained by hostile forces and deserve the law's full protection.

Only months after the end of World War II, when that conflict's terrible suffering was fresh in the minds of every American, Justice Rutledge, in language equally applicable today, warned his fellow citizens against withholding the right to due process from America's enemies:

> "[T]here can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

> "This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose." *In re Yamashita*, 327 U.S. 1, 41-42 (1946) (Rutledge, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PHILIP ALLEN LACOVARA
Counsel of Record
ANDREW J. PINCUS
ANDREW J. SCHAEFER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1157
(202) 263-3000

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In The Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD;
W.R. PAULETTE, COMMANDER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* EXPERTS ON THE LAW OF WAR IN SUPPORT OF PETITIONERS

Of Counsel:
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

HAROLD HONGJU KOH
Counsel of Record
MARY HAHN
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-8368

MICHAEL H. POSNER
JONATHAN M. FREIMAN
HUMAN RIGHTS FIRST
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

Attorneys For Amici Curiae Experts On The Law Of War

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are experts on international human rights and humanitarian law, sometimes referred to as the law of war.[1] *Amici* take no position on whether Petitioner Hamdi actually committed acts that might warrant his treatment as an enemy combatant for the Taliban. Nevertheless, they file this brief to challenge the President's unilateral decision to deny a United States citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions.[2] This unilateral decision radically departs from established law and practice to which the United States and other civilized nations have faithfully adhered for the past fifty years. *Amici* include:

Mary Robinson served as U.N. High Commissioner for Human Rights from 1997 to 2002. She previously served seven years as President of the Republic of Ireland, and 20 years as Senator.

George H. Aldrich was the Head of the United States Delegation to the Geneva Conference on International Humanitarian Law from 1974 to 1977 and is Red Cross Professor Emeritus of International Humanitarian Law at Leiden University. He sits as a judge on the Iran-United States Claims Tribunal and formerly served as Deputy Legal Adviser of the Department of State.

Payam Akhavan served as Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY).

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[1] Letters of consent to the filing of this brief accompany this brief. Pursuant to S.Ct. Rule 37.3, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* offer their analysis of the rights and obligations imparted by the Third Geneva Convention – and the import of those rights under the Supremacy Clause – independent of the other constitutional questions presented in this case.

Brigadier General David Brahms served as principal legal advisor for POW matters at Headquarters Marine Corps during the Vietnam War, senior legal advisor to the United States Marine Corps, and is now Executive Director of the Judge Advocates Association.

Jonathan Cedarbaum is a former Legal Officer and Deputy Chef de Cabinet in the Office of the President of the ICTY.

Mary Cheh is a Member of the Board of Directors of the National Institute of Military Justice, a Member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces, and professor of law at George Washington Law School.

Rear Admiral Don Guter served in the Navy from 1977 until 2002, when he retired from the military. He served as the Navy's Judge Advocate General from June 2000 through June 2002.

Rear Admiral John T. Hutson served as Judge Advocate General of the United States Navy from 1997 to 2000 and is Dean and President of the Franklin Pierce Law Center.

Robert Kogod Goldman is the Co-Director of the Center for Human Rights and Humanitarian Law and Professor of Law and Louis C. James Scholar at American University, Washington College of Law.

Howard S. Levie held the Stockton Chair of International Law from 1971 to 1972 and was later named the Military Chair of Operational Law at the U.S. Naval War College. For twenty-one years, he served as a member of the Judge Advocate General Corps of the U.S. Army. He has been an emeritus professor at St. Louis University School of Law since 1977.

Georg Nolte is a Professor of Law and Director of the Institute of International Law at the University of Göttingen.

Diane F. Orentlicher is Professor of International Law, faculty director of the War Crimes Research Office, and

Co-Director of the Center for Human Rights and Humanitarian Law at the Washington College of Law at American University.

Donald G. Rehkopf, Jr., is a former active-duty member of the Air Force Judge Advocate General Department who served in the Republic of Korea and Germany. He is Co-Chair of the Military Law Committee for the National Association of Criminal Defense Lawyers and a member of its Select Committee on Military Tribunals.

Stephen Saltzburg is General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Michael P. Scharf is a professor of law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the ICTY.

INTRODUCTION AND SUMMARY OF ARGUMENT

Faced with the torture and inhumane treatment of soldiers captured during the two world wars, nations throughout the world ratified the four Geneva Conventions nearly half a century ago. The third of these, the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter the "Third Geneva Convention" or "GPW"], confers upon captured soldiers substantive and procedural protections designed to check a detaining power's basest impulses. Central to these protections is a detainee's right to be treated as a prisoner of war ("POW"), unless and until his status – or even his innocence – has been determined by a "competent tribunal." *See* Third Geneva Convention, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42.

The United States has ratified all four Geneva Conventions, thereby making them the supreme law of the land. U.S. Const. art. VI. It has also directly incorporated language from the Third Geneva Convention into binding

military regulations. Finally, it has faithfully adhered to the requirements of the GPW in every conflict since World War II and has forcefully encouraged other nations to do the same. The United States' compliance has been based on both legal obligation and enlightened self-interest: the nation's recognition that its commitment to the Conventions centrally promotes the protection of U.S. soldiers abroad.[3]

The United States' treatment of Petitioner radically departs from this settled law and longstanding military history. Yaser Hamdi is alleged to have been a soldier serving with Afghan government forces and captured on a battlefield by Northern Alliance forces, then transferred to U.S. custody. The Third Geneva Convention unambiguously requires that the detaining power treat him as a prisoner of war unless and until a competent tribunal decides otherwise. Despite the claim (through his next friend) that he is an innocent civilian swept up in the confusion of war, he has been detained indefinitely, virtually incommunicado, and without the protections mandated by the Third Geneva Convention, for nearly two years.[4] Respondents have unilaterally denied him POW

[3] The policy reason for respecting the Geneva Conventions – to ensure the safety of America's own troops abroad – is extensively discussed in the Brief by *Amici* Certain Former Prisoners of War submitted on behalf of Petitioner in this action.

[4] In December, the Department of Defense ("DoD") announced that it would permit Hamdi's counsel to meet with him for the first time. The DoD made clear, however, that these meetings would be permitted only as a matter of discretion. *See* Press Release, Dep't of Defense, DoD Announces Detainee Allowed Access to Lawyer (Dec. 2, 2003), *available at* http://www.defenselink.mil/releases/2003/nr20031202-0717.html. The DoD later announced that meetings between Hamdi and his counsel would be recorded and conducted under the close supervision of military personnel. *See* Jerry Markon, *Military to Watch Prisoner Interview*, Wash. Post, Jan. 31, 2004, at B3. At this writing, Hamdi's

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status, without ever bringing him before a competent tribunal charged with the responsibility of determining him ineligible for such treatment. Nor has Hamdi ever been afforded the opportunity to assert that he was never a combatant at all.

Hamdi now challenges this treatment, asserting in part that the Third Geneva Convention guarantees these basic dignities and fundamental procedural rights. The Fourth Circuit brushed aside the Third Geneva Convention's clear requirement that an individual captured on the battlefield be treated as a POW unless and until a competent tribunal has resolved any doubt as to his status. This ruling ignored military regulations directly incorporating those directives as well as this nation's long and proud tradition of convening tribunals before stripping a combatant of his prisoner-of-war status.

This Court should reverse the Fourth Circuit's decision and affirm the clear text of the Third Geneva Convention, which under the Supremacy Clause constitutes the supreme law of the land. The Court should reaffirm that the writ of habeas corpus is the proper mechanism by which the legality of detention may be challenged. Petitioner Hamdi should be permitted to assert his claim to civilian status before a competent tribunal.

counsel has apparently met with Petitioner once under these conditions of supervision.

I. THE FOURTH CIRCUIT RADICALLY DEPARTED FROM THE SETTLED UNDERSTANDING AND APPLICATION OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

For the past half century, the United States has consistently recognized the unambiguous directives of the Third Geneva Convention to be legally binding. The GPW requires all contracting parties, including the United States, to treat those captured in the course of armed conflict as POWs "from the time they fall into the power of the enemy and until their final release and repatriation." Third Geneva Convention, art. 5, 6 U.S.T. at 3322, 75 U.N.T.S. at 140 [hereinafter Article 5]. There is one – and only one – mechanism by which POW protections may be denied by the detaining power:

> Should *any* doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal.*

GPW, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added); *see also* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571, 574-75 (2002) (stating that Article 5 creates a presumption of POW status). As the drafters of Article 5 made clear, the competent tribunal requirement ensures that "decisions which might have the gravest consequences [would] *not be left to a single person.*" Jean de Preux et al., *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (1960) [hereinafter *Official ICRC Commentary*] (emphasis added).

The meaning of Article 5 has been undisputed by the United States since its ratification of the Third Geneva

Convention in 1955.[5] Upon ratification of the treaty, the U.S. military immediately adopted regulations that recognized the competent tribunal requirement of Article 5. Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3, § I ¶ 71 (1956) (unamended by 1976 revision), *available at* http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch3.htm [hereinafter *Law of Land Warfare*]. Today, every department of the United States military has implemented the requirements of the Third Geneva Convention through binding regulations regarding the treatment of wartime detainees:

> *All persons* taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent authority.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), *available at* http://www.apd.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (emphasis added).[6] The language of Article 5 is incorporated directly:

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[5] Like Article 5, binding customary international law also includes the principle that a competent tribunal must resolve any doubt about the status of a captured combatant. That is why, in 1987, then-Deputy Legal Advisor of the State Department Michael J. Matheson explained that the United States considered binding customary humanitarian law to include the "principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal." *See* Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, *reprinted in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l & Pol'y 415, 425 (1987).

[6] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. *See id.*

> In accordance with Article 5, GPW, if *any* doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.

AR 190-8 § 1-6(a) (emphasis added). The same authoritative source directs that a "competent tribunal [of three commissioned officers] shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists." AR 190-8 § 1-6(b). Officers are trained to treat captives as POWs until their status is determined by a competent tribunal. *See, e.g.*, The Judge Advocate General's School, *Operational Law Handbook* 22 (William O'Brien ed., 2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added); Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations* § 11.7 (1995) [hereinafter *Commander's Handbook*] ("Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated"); *see also* Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving With or Accompanying Armed Forces in the Field*, Army Law., July 1994, at 29, 33 ("The result [of the presumption in favor of POW status] is a well thought out scheme in which, regardless of the context, each individual is

consistently given the benefit of the doubt until his or her status is conclusively determined.").[7]

These military regulations explicitly provide detainees the opportunity to assert not only POW status, but also any claims of *innocence*, i.e., a claim that the detainee is not a combatant at all. Thus, the multi-force regulation authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian who should be immediately returned to his home or released." AR 190-8 § 1-6(e)(10). This is precisely the sort of claim that Hamdi (through his father) makes here.

Respondents' failure to convene a competent tribunal to determine Hamdi's status not only contravenes these military regulations implementing Article 5 but also radically departs from the practices to which the U.S. military has faithfully adhered in every major conflict since World War II. *See* Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), *available at* http://fpc.state.gov/documents/organization/9655.pdf (stating that the United States "has in the past interpreted [Article 5] as requiring an individualized assessment of status before privileges can be denied"). During the Korean War, the

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[7] The U.S. Marine Corps instructs its future officers to adhere to the GPW in their treatment of enemy prisoners – even if the enemy itself has violated the GPW – for two reasons: "a. This country is a law-abiding nation. It abides by international law and expects its individual citizens, especially servicemen, who are official representatives, to do likewise. The damage to our national interest and the adverse reaction of world public opinion as a result of non-adherence to the Geneva Convention by Americans would be serious[; and] b. A treaty such as the Geneva Convention of 1949, once ratified by the Senate, becomes part of the 'Law of Land Warfare'. *Thus, violation of the Geneva Convention would be equal to violating a federal law.*" United States Marine Corps, *Lesson 9: Code of Conduct*, Lesson Plan for Naval Science 313: Marine Corps Leadership Theory and Techniques 9 (2003) (emphasis added), *available at* https://navy.rotc.psu.edu/NROTC%20Classes/313/NOTES/Lesson9/LP3008CodeofConductLesson9.doc.

United States military treated Chinese soldiers as POWs under the Convention, even though neither the United States nor the United Nations recognized the communist government. Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm.

During the Vietnam War, the United States military directed that all combatants captured during military operations were to be accorded prisoner-of-war status, regardless of the type of unit to which they belonged. U.S. Military Assistance Command for Vietnam ("MACV"), Directive No. 381-46, Annex A (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968) [hereinafter *Contemporary Practice*]. Another directive reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to [prisoner of war] status is in doubt *until such time as his status has been determined by a competent tribunal.*" MACV, Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice*, *supra*, at 768 (emphasis added). MACV Directive 20-5 explicitly identifies the Third Geneva Convention as "applicable law." *Id.* at 771.

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to resolve the status of individuals detained as enemy combatants during Operation Desert Storm. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* app. L at 577 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf [hereinafter *Conduct of Persian Gulf War*], *cited in* Dep't of the Army, *Law of War Workshop Deskbook* 79 (Brian J. Bill ed., 2000) [hereinafter *Law of War Workshop Deskbook*]. And in the most recent conflict in Iraq that commenced in 2003, the U.S. military has reported treating all detainees as POWs before holding Article 5 tribunals. *See* Dep't of Defense, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003), *available at* http://www.defense

link.mil/news/Apr2003/t04072003_t407genv.html; *see also* Dep't of Defense, Enemy Prisoner of War Briefing from Kuwait City (May 8, 2003), *available at* http://www.defense link.mil/transcripts/2003/tr20030508-0160.html (indicating that the military had convened approximately fifty to one hundred Article 5 tribunals). Thus, despite the Fourth Circuit's hypothesized concerns that granting proceedings before competent tribunals might interfere with the conduct of the war, *see, e.g.*, *Hamdi v. Rumsfeld*, 316 F.3d 450, 470-71 (4th Cir. 2003) [hereinafter *Hamdi III*]; *Hamdi v. Rumsfeld*, 337 F.3d 335, 342-43 (4th Cir. 2003) [hereinafter *Hamdi IV*] (Wilkinson, J., concurring in the denial of rehearing en banc), in practice, the United States military has consistently proven itself fully capable of complying with the clear directive of Article 5 during wartime.[8]

Paradoxically, the United States invokes the laws of war as the source of its authority to detain Petitioner, yet refuses to abide by the clear mandates of the Geneva Conventions that lie at the heart of these laws of war. The government asserts that Hamdi has no right to challenge the deprivation of his POW (or civilian) status under Article 5 because the Executive Branch has unilaterally determined that there is no doubt that Taliban detainees, including Hamdi, are not entitled to POW status. (Opp. Cert. Brief at 29.) There is, however, an emerging consensus that cast considerable doubt on the Executive's categorical assertions about the status of the Taliban soldiers

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[8] Military regulations outline clear procedures governing the hearings before competent tribunals that balance individual fairness and military necessity. The panel consists of three commissioned officers and the individual's status is determined by majority vote of the panel. The determination is made based upon a preponderance of the evidence standard. The proceedings are presumptively open, except where security may be compromised. The detainee has a right to be present during open proceedings and is entitled to address the tribunal and present witnesses, where reasonable. Where military necessity requires otherwise, written submissions can substitute for live testimony. *See* AR 109-8 §§ 1-6(c), (e).

under the Third Geneva Convention. *See* H. Wayne Elliot, Crimes of War Project, *POWs or Unlawful Combatants: September 11 and Its Aftermath* (2002), *at* http://www.crimesofwar.org/expert/pow-elliott.html (stating that no rationale exists for denying them POW status); Jonathan Turley, *Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 648, 756-57 & n.685 (2002) (stating that argument that Taliban fighters are not POWs is "virtually meritless"); Avril McDonald, *Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich*, 2002 Humanitäres Völkerrecht 206, 208 ("The Tal[i]ban are entitled to be considered as POWs."). If, as the U.S. government now proposes, unilateral executive decisions about a detainee's status could foreclose all opportunity to assert POW or civilian status before a competent tribunal, Article 5 would be rendered a nullity. This Court should reject such an interpretation, which is squarely at odds with the text, history, and purpose of the Convention.

This categorical denial of POW protections for all combatants of the Taliban further ignores the fact that detainees like Petitioner claim to have been civilians who never fought with the Taliban at all. Moreover, this blanket denial of POW protections is at odds with the GPW's requirement of *individualized* determinations of status by a competent tribunal. *See* Naqvi, *supra*, at 574-75 ("States should not be able to unilaterally decide that no doubt has arisen for an entire group of captured persons who have taken part in hostilities.").

That categorical denial also contravenes fifty years of unbroken military practice. The U.S. military has consistently understood that "doubt arises and a tribunal is required *whenever* a captive who has participated in hostilities asserts the right to be a POW." George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l Law 891, 898 (2002) (emphasis added). The Army's manual on the law of land warfare states that:

> [Article 5] applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces *and who asserts that he is entitled to treatment as a prisoner of war* or concerning whom any other doubt of a like nature exists.

Law of Land Warfare, *supra*, at ch. 3, § I ¶ 71 (emphasis added). U.S. Navy regulations advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" *Commander's Handbook*, *supra*, at § 11.7 (emphasis added). Hamdi, through his father, has made just such an assertion. (*See* Pet. for Cert. at 30-31.)

Petitioner is accused of possessing a firearm and affiliating and fighting with a Taliban unit before falling into the hands of the Northern Alliance. (Mobbs Decl. ¶¶ 3-4.) Yet even if these disputed allegations were assumed to be true, they would not license the government's sudden departure from longstanding military practice or its derogation from Article 5 of the Third Geneva Convention. Nothing in the record suggests that Hamdi was anything but an ordinary foot soldier for the Taliban. Taking up arms with the enemy, without more, does not justify denying Hamdi POW status or the opportunity to assert his claim before a competent tribunal – by definition, prisoners of war routinely engage in the kind of hostile acts alleged against Petitioner.[9] Yet in direct

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[9] Respondents label Hamdi an "enemy combatant" to suggest that he is not entitled to POW status. The term "enemy combatant" merely signifies a member of the armed forces of a nation with which the United States is at war. The government's use of this phrase improperly blurs the critical distinction drawn in the Geneva Conventions between privileged and unprivileged combatants. Privileged combatants, who fall within one of eight categories outlined in Article 4 of the Third Geneva Convention, are afforded full POW protections. Whether an individual falls within one of the Article 4 categories is a fact-intensive

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contravention of Article 5, Respondents have summarily deprived Hamdi of POW status without permitting a competent tribunal to resolve his challenge to this deprivation.

Moreover, Petitioner disputes that he is a combatant at all. *Hamdi IV,* 337 F.3d at 360 (Luttig, J., dissenting from denial of rehearing en banc). ("*[I]t simply is not 'undisputed' that Hamdi was seized in a foreign combat zone.*") (emphasis in original). Our military history demonstrates that claims of innocence are often adjudicated in favor of the detainee. The 1,196 tribunals convened during Operation Desert Storm resulted in 310 individuals being granted POW status. The remaining 886 detainees who presented claims before the tribunals "were determined to be *displaced civilians* and were treated as refugees." *Conduct of the Persian Gulf War, supra,* at 578 (emphasis added).

Nor does anything suggest that the risk of error during the recent war against Afghanistan was any less than during our past military engagements. Petitioner was taken prisoner by Northern Alliance forces and moved to two different prison facilities before being transferred into U.S. custody. (*See* Mobbs Decl. ¶¶ 4-5, 7.) Several detainees now released after months of captivity have made claims similar to those asserted by Petitioner – that they too were innocent civilians captured by non-U.S. troops in Afghanistan who were bounty hunters.[10] The

question. Where an individual asserts his POW or civilian status, only a competent tribunal convened under Article 5 can resolve these disputes.

[10] *See, e.g.*, Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantánamo*, N.Y. Times, Feb. 11, 2004, at A3 (quoting released teenager who claims to have been captured by non-U.S. forces while looking for a job; "[the Americans] were good people . . . . I am angry with the Afghans who handed me over to the Americans. The Americans did not know what was happening."); Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda

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Secretary of Defense has now admitted that detentions may have been overbroad. *See* Dep't of Defense, Secretary Rumsfeld Media Availability en route to Camp X-Ray, (Jan. 27, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html ("Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there.") (remarks of Respondent, Secretary of Defense Donald H. Rumsfeld). Thus, doubt still exists about Petitioner's status under the Convention, which only an individualized hearing before a competent tribunal can resolve.

In sum, in violation of the Third Geneva Convention and half a century of consistent military practice, Petitioner has been stripped of prisoner-of-war protections, denied a hearing by a competent tribunal under Article 5, and detained virtually incommunicado in a military brig for nearly two years. Straightforward application of the legal mandates of the GPW and military regulations, supported by unwavering military practice, demands that Hamdi be considered a POW unless and until a competent tribunal determines otherwise.

II. THE FOURTH CIRCUIT'S REFUSAL TO ENFORCE ARTICLE 5 IGNORES THE TEXT, STRUCTURE AND HISTORY OF THE TREATY AND VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

Despite the binding nature of duly ratified treaties, the lower court dismissed Hamdi's habeas petition with the startling conclusion that the Third Geneva Convention poses "no purely legal barrier" to Hamdi's indefinite detention. *Hamdi III,* 316 F.3d at 469. In fact, a treaty's constitutional standing as supreme law of the land is well

fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").

established – and the text and history of Article 5 make clear that in any armed conflict to which the Geneva Convention applies, a captured individual must be treated as a POW unless and until a competent tribunal determines that he is not entitled to such treatment.[11] The Fourth Circuit's dismissal of Hamdi's petition effectively denies the GPW its legal status under the Supremacy Clause. It also ignores the federal statute on which Hamdi bases his petition, which plainly states that the writ of habeas corpus may be granted to a person who is "in custody in violation of the Constitution or laws or *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added).

A. The Supremacy Clause Requires That Hamdi Be Treated As A POW Unless And Until A Competent Tribunal Determines He Is Not Entitled To That Status.

The Supremacy Clause unambiguously declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. In parallel language, Article III explicitly confers on federal courts jurisdiction over cases involving treaties: "The judicial Power shall extend to all

[11] Although the Executive has denied POW status to Taliban combatants, Respondents concede that the Geneva Conventions cover the recent war against the Taliban. *See* White House Office of the Press Secretary, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html ("[T]he President has determined that the Taliban are covered by the Convention.").

Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made*, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1 (emphasis added). As this Court has long recognized, a ratified treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe *a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (emphasis added).

Article 5 of the Third Geneva Convention, ratified by the United States nearly fifty years ago, *see* GPW, 6 U.S.T. at 3425, 3428, 75 U.N.T.S. at 242, 246, is indisputably the "supreme Law of the Land," and a U.S. court may employ it as a rule of decision to determine Hamdi's rights on a petition for a writ of habeas corpus. The Fourth Circuit avoided the clear text of the Supremacy Clause of the Constitution by invoking the doctrine of "self-execution" of treaties.[12] The court cursorily concluded that the Convention does not "evidence[] an intent to provide a private right of action." *Hamdi III*, 316 F.3d at 468 (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)).[13] But by so saying, the Fourth Circuit

[12] A self-executing treaty is one that operates as law without requiring implementing legislation. *See Restatement (Third) of the Foreign Relations Law of the United States* § 111 para. 4 (1987) [hereinafter *Restatement*] ("An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.").

[13] The Fourth Circuit summarily concluded that the Third Geneva Convention was not self-executing without any analysis of the text or history of Article 5. The self-executing nature of Article 5 of the Third Geneva Convention is established in Part II.B of this brief.

conflated two very different questions: whether the GPW provides a *private cause of action* and whether it is a binding treaty whose provisions a U.S. court is authorized to enforce as a *rule of decision* in a federal habeas proceeding.

The text of the habeas statute unambiguously allows a petition premised on "custody in violation of the ... *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added). The Third Geneva Convention constitutes such a duly ratified treaty under which habeas relief can be granted. Thus, the federal habeas corpus statute provides Hamdi with a cause of action and Article 5 of the Third Geneva Convention provides the rule of decision by which his claim for habeas relief should be decided. Reading the unambiguous text of the habeas statute, this Court declared more than a century ago, "we see no reason why [a petitioner] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." *Wildenhus' Case*, 120 U.S. 1, 17 (1887) (analyzing petitioner's treaty claims under nearly identical language of predecessor habeas statute).

U.S. courts have regularly understood that habeas relief can be granted whether or not a private cause of action for civil damages also exists. For example, prior to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971), and its progeny, this Court had expressly reserved the question whether a violation of various constitutional amendments gave rise to a cause of action for damages. Nonetheless, federal courts had routinely turned to the Fourth, Fifth, and Sixth Amendments as controlling *rules of decision* to determine whether habeas petitions should or should not be granted. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (Fourth Amendment).

As the text and history of the Third Geneva Convention make clear, *see infra* Part II.B, Article 5 plainly "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Head Money Cases*, 112 U.S. at 598-599. As such, under the Supremacy

Clause, Article 5 is "binding alike [on] National and state courts, and is capable of enforcement, and must be enforced." *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 273 (1909).[14] Indeed, the U.S. Military has itself long recognized that the Convention – as a "law ... of the United States" – provides the binding legal rule by which this habeas petition must be judged. *See Law of War Workshop Deskbook*, *supra*, ch. 5, § IV(E)(3), at 85 (prisoners of war "have standing to file a Habeas Corpus action ... *to seek enforcement of their GPW rights*") (emphasis added).[15]

These precedents and military practice reflect the Framers' intent, as evidenced in the Constitutional text itself. As Justice O'Connor has explained, "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, *in International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

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[14] *See also, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (relying on treaty as rule of decision to determine legality of state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of writ of mandamus against state official).

[15] *See also Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (declaring that the GPW "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]he GPW provisions in issue here are a part of U.S. law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law. ...").

The Fourth Circuit claimed that if the habeas statute provided a cause of action, a habeas court granting a petition using a rule of decision derived from the Third Geneva Convention might constitute "a mechanism of enforceability that might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469. But this speculative concern cannot justify the court's decision to ignore both the Supremacy Clause and the clear text of the habeas statute. The courts have long recognized the power of Congress to provide such a remedy.[16] *See* U.S. Const. art. I, § 8; *Restatement*, *supra*, § 906 cmt. b ("A state may provide a domestic remedy for its own violations of international law . . ."). In enacting the habeas statute, Congress has unambiguously allowed prisoners to petition courts for habeas relief based on treaty violations. Courts are required to give effect to this act of Congress and to hear habeas petitions that allege violations of a ratified treaty.[17]

While the precise facts surrounding Hamdi's capture remain in dispute, no one disputes that the U.S. government has denied him prisoner of war protections without convening a competent tribunal to determine his status, as required by Article 5. That denial violates the GPW and the constitutional provisions making that convention the supreme law of the United States, and it may properly be raised on a writ of habeas corpus.

[16] Indeed, the very nature of a domestic statute is that it "might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469.

[17] Any putative concerns about interfering with military decisions of the Executive and Legislative branches, *see Hamdi IV* at 343-45 (Wilkinson, J., concurring in the denial of rehearing en banc), ignore the key fact that the political branches, by the act of treaty ratification, have already required that the U.S. military comply with the mandates of Article 5.

B. The Fourth Circuit's Reading Of The Convention Is Incompatible With The Text, History And Structure Of The Convention.

The Fourth Circuit did not deny that officials of the United States must abide by the Third Geneva Convention or that the clear text of Article 5 of the Convention requires treating a person captured in battle as a POW unless and until a competent tribunal finds he is not entitled to such treatment. Rather, it concluded that the GPW was "not self-executing" because it created only "diplomatically-focused rights." *Hamdi III*, 316 F.3d at 468-69. Yet this conclusion was not based on any analysis of the text, history, or structure of the Third Geneva Convention. In revising the Geneva Conventions after World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). As the central procedural mechanism by which states parties would respect and ensure the rights of the Convention, Article 5 is clearly self-executing and enforceable in court even absent a cause of action under the habeas statute.

This Court has long recognized that rights established by treaty provisions are directly enforceable in federal court. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under treaty as defense against state proceedings); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Heong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights established by treaty with China). Most recently, this Court has held that a treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States," a condition plainly applicable here. *Trans World Airlines,*

Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).[18] The straightforward provisions of the Third Geneva Convention, including Article 5, clearly "prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases*, 112 U.S. at 598-599; *see also United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable). As a self-executing treaty provision, Article 5 of the GPW thus provides a cause of action that is separate and independent from that provided in the federal habeas statute.

Nothing in the Third Geneva Convention suggests that it is enforceable by states only. Whether under the habeas statute or as an independent cause of action, the *text* of the Convention makes clear that a captured soldier may directly invoke his personal rights. Article 6 states clearly that no agreement among States "shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the *rights that it confers upon them*." GPW, art. 6, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added). The Third Geneva Convention expressly secures rights to "persons . . . who have fallen into the power of the enemy." GPW, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138. The GPW repeatedly refers to "*persons* protected by the present Convention," GPW, art. 10, 6 U.S.T. at 3326, 75 U.N.T.S. at 144 (emphasis added), and to "protected persons," GPW, art. 11, 6 U.S.T. at 3326, 75 U.N.T.S. at 144. Article 7 provides that "[p]risoners of war may in no circumstances renounce in part or in entirety the *rights secured to them* by the present Convention." GPW, art. 7, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasis added). Under the Fourth Circuit's interpretation, this article would nonsensically forbid prisoners of war to renounce individual "rights" that they do not

[18] When advising and consenting to ratification, the Senate recognized only a few provisions of the treaty that required domestic implementing legislation. *See infra* at 26.

possess. Article 78 further provides that prisoners "shall have the right to make known to the military authorities" their complaints about the conditions of their captivity. *Id.* at art. 78, 6 U.S.T. at 3566, 75 U.N.T.S. at 197. This article authorizes prisoners acting directly, not through their state's diplomats, to bring their claims to the detaining power. Yet ignoring this text, the Fourth Circuit simply asserted that a Convention replete with the language of individual rights should be read to rely *only* on diplomatic enforcement between states.

Similarly, the *history* and *structure* of the treaty make clear that Article 5 is self-executing. In 1949, states parties negotiated a substantially revised version of a prior international convention. The predecessor convention required signatory states merely to "respect[]" the convention. 1929 Convention Relative to the Treatment of Prisoners of War, art. 82, July 27, 1929, 47 Stat. 2021, 2059 ("1929 Convention") ("The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances."). In 1949, the drafters crafted a new provision that requires states parties not only "to *respect*" the Convention, but also "to *ensure* respect for the present Convention in all circumstances." Third Geneva Convention, art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added). The treaty makers underscored the significance of this change by moving this language about states' obligations from the rear of the document, Article 82 of the 1929 Convention, to the front, Article 1 of the 1949 Convention.

The additional language and the restructuring worked a fundamental change. By ratifying the Third Geneva Convention, each party necessarily undertook to treat it as binding law within its own legal system. As the official ICRC commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of *unilateral engagements* solemnly

> contracted before the world as represented by the other Contracting Parties.

Official ICRC Commentary, *supra*, at 17-18 (emphasis added).[19]

To "ensure respect" for the Convention, the drafters introduced Article 5 as a key procedural innovation in the 1949 Convention. By requiring status determinations by a competent tribunal, the 1949 Convention created a new check on executive power that was markedly absent from the predecessor 1929 Convention. *Compare* Third Geneva Convention, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42, *with* 1929 Convention, art. 82, 47 Stat. at 2059. The drafters of Article 5 recognized "that decisions which might have the gravest consequences should not be left to a single person." *Official ICRC Commentary*, *supra*, at 77. The drafters considered and expressly rejected a formulation of the new article that would have simply left status determination to a "responsible authority," such as Respondents here. Instead, the drafters insisted in Article 5 that the determination of a detainee's status should be made by a "competent tribunal." *Id*; *see also* Sarnoski, *supra*, at 32 ("The requirement for such a tribunal was intended to avoid the possibility of arbitrary decisionmaking . . . and to discourage summary executions.").

Like the drafting history, the *legislative history* surrounding the ratification of the Geneva Conventions by the United States reveals a deep understanding that the

[19] This Court's analysis of the non-self-executing nature of the 1929 Geneva Conventions highlighted the need for reform in the 1949 Conventions. *Johnson v. Eisentrager* emphasized that reciprocity and diplomacy were the "obvious scheme" of enforcement in those previous conventions. 339 U.S. 763, 789, n. 14 (1950). That scheme failed to prevent inhumane treatment of our soldiers and the drafters of the 1949 Geneva Conventions self-consciously sought to reform this ineffective scheme by providing individually-enforceable rights and – importantly – the Article 5 procedures.

act of ratification created legally binding domestic obligations. In recommending advice and consent to ratification of the conventions, the Senate Foreign Relations Committee underscored that, with ratification, the United States would make *binding* what had previously been matters of mere policy and practice. The substantive provisions of the conventions would operate not as hortatory principles used mainly as rhetorical tools in diplomatic negotiations, but as legal *injunctions*:

> Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. As emphasized in this report, the requirements of the four conventions to a very great degree reflect the actual policies of the United States in World War II. The practices which they *bind* nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the *injunctions* of formal treaty obligations.

S. Rep. No. 84-9, at 32 (1955) [hereinafter *Ratifying Report*] (emphasis added). The Committee urged strict adherence to the conventions, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the *obligations* of decent treatment which it has freely assumed in these instruments." *Id.* (emphasis added). The Committee concluded that adoption of these rights was the best way to secure better treatment for U.S. soldiers, based on the experiences of U.S. soldiers captured during the Korean War:

> If it be objected that the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized norms, it is also true that without the convention, that treatment could have been still worse.

Id. at 31.

To ensure that the conventions would be fully implemented by the United States, the Senate Foreign Relations Committee combed through the provisions of each of the four conventions to determine which provisions, if any, required implementing legislation. In reviewing the conventions, the Committee concluded that "it appears very little in the way of new legislative enactments will be required to *give effect* to the provisions contained in the four conventions." *Id.* at 30 (emphasis added). The Committee found only four provisions that required implementing legislation, none of which are applicable here.[20] Unsurprisingly, given the clarity of its textual requirements, Article 5 of the GPW was not included among those few provisions that the Committee understood to require implementing legislation. *Id.*

The Committee's conclusion that some *but not all* provisions required implementing legislation is consistent with this Court's recognition that treaties that contain provisions enforceable by the states parties may also include provisions that confer rights upon individuals

[20] The implementing legislation deemed necessary was as follows: 1. Changes in 18 U.S.C. § 706 relative to restrictions on the use of the Red Cross emblem by commercial enterprises; 2. Legislation to provide workmen's compensation for civilian internees; 3. Legislation to exempt relief shipments from import, customs and other dues; 4. Penal measures to enforce provisions that prisoner of war camps must be identified by the letters PW, PG or IC. *Ratifying Report*, *supra*, at 30-31. In contrast, the Committee viewed the requirement under Article 129 that states parties criminalize "grave breaches" of the Conventions already to have been met by the existing criminal code. *Id.* at 27. When the Senate determined decades later that American obligations under Article 129 were not being fully met by existing criminal statutes, Congress enacted the War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), to bring the U.S. into compliance with its obligations under the Geneva Conventions. *See* H.R. Rep. No. 104-698, at 1 (1996) (stating purpose "[t]o carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.").

"which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. at 598 (analyzing provisions of treaty separately to determine whether they are self-executing); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); *Restatement*, *supra*, § 111, cmt. h ("Some provisions of an international agreement may be self-executing and others non-self-executing."). Yet ignoring this Court's longstanding self-execution analysis, the lower court simply asserted that a brief reference to diplomatic measures in two articles of the GPW rendered the entire GPW non-self-executing. Two invocations of diplomacy elsewhere in the lengthy convention do not negate the self-executing nature of Article 5.[21]

The lower court's assertion that diplomacy provides the sole mechanism to vindicate the rights of the captured runs squarely contrary not only to text and ratification, but also to logic. The Third Geneva Convention was designed to have force in cases of armed conflict, i.e., precisely when unilateral respect for humanitarian law by states parties is most crucial, but normal diplomatic channels are least effective. *See Official ICRC Commentary*, *supra*, at 18. The drafters of the Convention were well aware that diplomatic measures contained in the 1929 Conventions had failed badly during wartime. *See id.* at 632 (analyzing ineffectiveness of Article 30 of 1929 Geneva Convention); A. Hammarskjöld, *Revision of Article*

[21] The Fourth Circuit relied heavily on the enforcement provision of Articles 11 and 132 of the Third Geneva Convention for its argument that the GPW's values are to be vindicated by diplomatic means alone. However, Article 11 invokes diplomatic means only "in cases where [states] deem it advisable;" it by no means limits the enforcement of the GPW to diplomacy alone. Article 132 likewise does not restrict the means by which Article 5 may be enforced, as the drafters chose to augment the predecessor of Article 132 with the more protective Article 5.

30 of the Geneva Convention, in International Committee of the Red Cross, *Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929* at 83, 91 (1938). The very failure of these measures highlighted the need for rules directly enforceable by individuals. In the wake of World War II, the United States would hardly have entrusted the fate of its soldiers to diplomatic mechanisms that had already proven woefully inadequate. Indeed, the Fourth Circuit's insistence that Hamdi rely on diplomacy in this case would lead to a patently absurd result: clearly, reliance on diplomatic channels to vindicate Hamdi's Article 5 rights would be completely meaningless when the country detaining him is his own.[22]

In sum, by consenting to ratification of the Geneva Conventions, the Senate intended legally to bind the United States to policies that it had concluded were in the best interests of U.S. soldiers. Moreover, it intended to bind future Executives to obey the conventions, even while anticipating that future enemies might "invoke specious reasons to evade compliance with the obligations . . . freely assumed in these instruments." *Ratifying Report*, *supra*, at

[22] The Third Geneva Convention does not have a nationality requirement for POW status. Significantly, this omission contrasts with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), which expressly requires diversity of nationality with the detaining power as a precondition for protected status. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290; *see also* Howard S. Levie, *Prisoners of War in International Armed Conflict* 76 (1977) (concluding that international law requires "that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality . . ."); R.J. Wilhelm, *Peut-On Modifier Le Statut Des Prisonniers De Guerre?*, 53 Revue Internationale de la Croix-Rouge 516, 685-88 (1953).

32. That binding obligation was to endure whether or not a future Executive shared President Eisenhower's concern that the United States "would not want to give [an enemy] the excuse or justification for treating our prisoners more harshly than he was already doing." Dwight D. Eisenhower, *Crusade in Europe* 469 (1948).

By ratifying the Convention, the political branches made it "the supreme law of the land, binding alike National and state courts, and [] capable of enforcement, and must be enforced in the litigation of private rights" to ensure that captured combatants are treated in accord with the Conventions. *Maiorano*, 213 U.S. at 273. Petitioner Hamdi is entitled to invoke those rights here.

The Fourth Circuit's anomalous conclusion that Article 5 rights may not be enforced by habeas petition, but only by diplomatic means, would leave the Convention's application subject not to law, but to the whim of the detaining country. The sad history of prisoners of war has amply demonstrated the danger of affirming such a result.

CONCLUSION

For nearly fifty years, the United States military has faithfully adhered to the unambiguous directives of Article 5 of the Third Geneva Convention. In detaining Petitioner without POW protections and denying him any opportunity to present his claim of innocence before a competent tribunal, the United States has radically departed from the mandates of the law and its own military tradition.

For the foregoing reasons, *Amici* urge this Court to reverse the judgment below, to reaffirm the status of the Third Geneva Convention under the Supremacy Clause,

and to confirm Hamdi's right to seek determination of his status before a competent tribunal.

Respectfully submitted,

HAROLD HONGJU KOH
Counsel of Record
MARY HAHN
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC
127 Wall Street
New Haven, CT 06511[23]
(203) 432-8368

MICHAEL H. POSNER
JONATHAN M. FREIMAN
HUMAN RIGHTS FIRST
333 Seventh Avenue,
13th Floor
New York, NY 10001-5004
(212) 845-5200

Counsel for Amici Curiae

Of Counsel:
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

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In The

Supreme Court of the United States

YASER ESAM HAMDI and ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TIMOTHY LYNCH*
CATO INSTITUTE
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to deprive citizens of their liberty, hold them incommunicado, and severely limit their access to the courts to seek redress, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE

The petitioner, Yaser Esam Hamdi, is an American citizen. He is presently confined in a military brig in the United States. A petition for a writ of habeas corpus has been filed on his behalf and that petition alleges that Mr. Hamdi's imprisonment is contrary to the law.

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

The Government claims that Mr. Hamdi is an "enemy combatant" – a soldier affiliated with the Taliban, the former government of Afghanistan. Mr. Hamdi appears to have been initially seized by the Northern Alliance forces in Afghanistan and he was thereafter turned over to the U.S. military. Mr. Hamdi was then transferred to a U.S. military base in Cuba where prisoners from the war in Afghanistan are being held. In April 2002, the Government moved Mr. Hamdi to a naval brig in Norfolk, Virginia.

For almost two years, the Government has denied Mr. Hamdi any access to legal counsel. The Government claims that the Executive has unilateral authority to identify "enemy combatants" and to hold them incommunicado indefinitely. Because it is physically impossible for a prisoner to file a writ of habeas corpus in such circumstances, an attorney must file a "next friend" petition on the prisoner's behalf. The Government's position is that such petitions must be "properly filed" even though the attorney has not been able to meet with the prisoner to discuss the Government's allegations. The Government also maintains that properly filed petitions should be summarily dismissed if the prisoner has been deemed by the executive authorities to be an "enemy combatant."

SUMMARY OF ARGUMENT

Since the September 11th terrorists attacks, the Federal Government has made several sweeping constitutional claims – that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation (including with legal counsel), and, in effect,

deny the prisoner access to Article III judges to seek the habeas "discharge" remedy. As long as the Executive has issued "enemy combatant" orders to his Secretary of Defense, the Government claims, the process comports with the Constitution – regardless of whether the prisoner is an American citizen or whether the arrest-seizure takes place overseas or on American territory. Repeatedly, the Government conflates three distinct issues: seizure of citizens, detention of citizens, and trial of citizens. In effect, the Government is using the "enemy combatant" label to revive Attorney General James Speed's claim that when the country is at war, the president becomes "the supreme legislator, supreme judge, and supreme executive." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866) (Argument for the United States). This Court should reject that claim in the most emphatic terms.

The constitutional issue before the Court is not complicated. If the writ of habeas corpus has not been suspended, the writ retains its full legal force. The problem in this case is that the court below dismissed the habeas petition too casually. The prisoner, Yaser Esam Hamdi, has not had an opportunity to meet with counsel in order to respond to the Government's allegations. This Court should reverse the ruling below and remand this case for further proceedings.

ARGUMENT

I. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE FOURTH AMENDMENT

The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend IV.

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573 (1980). The amendment shields the citizenry from overzealous government agents by placing limits on the powers of the police. The primary "check" is the warrant application process. That process requires the police to apply for arrest warrants, allowing impartial judges to exercise independent judgment regarding whether sufficient evidence has been gathered to meet the "probable cause" standard of the Fourth Amendment. *McDonald v. United States*, 335 U.S. 451 (1948). When government agents seize a citizen without an arrest warrant, the prisoner must be brought before a judicial magistrate within 48 hours so that an impartial judicial officer can examine the government's conduct and discharge anyone illegally seized. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Although there is no Fourth Amendment issue before the Court in the instant case, it would be useful for this Court to craft its ruling in such a way as to clarify

precisely which legal matters have and have not been settled. This is important because the Government has been selectively quoting caselaw from this Court in an attempt to turn dicta into holdings. For example, the Government has been employing language from *Ex Parte Quirin*, 317 U.S. 1 (1942), which is a case involving *trial procedures* for enemy combatants, to make sweeping claims about the Executive's power to *seize* citizens on American soil. *See, e.g.*, Respondent's Brief on Motion To Dismiss Amended Petition for Writ of Habeas Corpus, at 5-6, *Padilla v. Rumsfeld* (S.D.N.Y.) (No. 02-4445) (2002) ("The authority [of the Executive] to *capture* and detain is not diminished by the fact that the enemy combatant is an American citizen. See *Quirin*, 317 U.S. at 37-38.") (Emphasis added). The import of such selective quotations is to suggest that this Court has considered and approved an Executive power to conduct arrests outside of the Fourth Amendment's framework in those instances where a suspect has been deemed an "enemy combatant."[2]

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[2] The point here is *not* that the Government relied upon some "inherent" Article II power when it took Mr. Padilla into custody. Rather, the point is that the Government has been implying that it *can* bypass the Fourth Amendment and judicial scrutiny whenever it claims to be pursuing "enemy combatants." *See* Timothy Lynch, "Breaking the Vicious Cycle," Cato Institute Policy Analysis (June 26, 2002), pp. 8-9. The Government has searched American homes on such dubious "inherent" Article II legal theories, but the legality is rarely scrutinized in reported decisions because homeowners typically agree to a plea bargain and thus drop the Fourth Amendment objection. *See, e.g.* R. Jeffrey Smith, "Administration Backing No-Warrant Spy Searches," *Washington Post*, July 15, 1994 (noting the warrantless search of the home of Aldrich Ames).

To be sure, this Court has never suggested that Fourth Amendment principles and procedures apply to the battlefield, but it is equally clear that this Court has never sanctioned executive arrests warrants of citizens on U.S. soil. The Government's inferences to the contrary can be very misleading.

II. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE LAW OF HABEAS CORPUS

A.

The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. Clearly, the Constitution contemplates exigent circumstances in which "public Safety" will require the Executive to move swiftly against persons who are perceived to be dangerous.[3] In those situations, it is likely that the Executive will not be able to comply with constitutional norms for every search, arrest, and imprisonment. The suspension of the writ will thus excuse otherwise illegal arrests and dragnet tactics because emergency circumstances can warrant such actions.

As long as the writ of habeas corpus is *not* suspended, however, the Executive must follow constitutional norms.

[3] Since the Suspension Clause appears in Article I, the implication is that the legislative branch of government is empowered to suspend the writ. Since the Government is not making any claims with respect to suspension in the instant case, no further discussion of this point seems necessary.

"Thus, it has been held that in the absence of Congressional action a writ of habeas corpus cannot be denied in a proper case even in wartime." 39 Am. Jur. 2d, Habeas Corpus, § 5, p. 206 (citing *Ex Parte Stewart,* 47 F.Supp. 410 (1942)).

Thus far, the resolution of this case is straightforward and uncomplicated. If the writ of habeas corpus has not been suspended, it retains its full legal force. The prisoner here, Mr. Hamdi, is an American citizen and the petition that has been filed on his behalf complains that his confinement is unlawful. The startling fact that Mr. Hamdi has not been able to meet with an attorney to fully present a habeas petition appears to be plain error. The Government, however, denies the force of this contention. Having conceded the major premise – that the writ has not been suspended – the Government challenges the minor premise – that the writ retains its full legal force. On the Government's view, the Constitution requires improvised habeas procedures for "enemy combatants."

The Government advances two arguments to support this theory. The first argument is that Article III courts may not "second-guess" the Executive's "enemy combatant" determination – even in habeas corpus petitions that have been properly filed on behalf of American citizens. Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895). That shocking assertion strikes at the heart of habeas corpus.

The right to habeas corpus is, in essence, a right to judicial protection against lawless incarceration by executive authorities. If the judiciary could not "second-guess" and reject the Executive's initial decision to imprison a

citizen, the writ would never have acquired its longstanding reputation in the law as the "Great Writ." By way of background, here is how Justice Story defined the writ in his treatise on constitutional law:

> *Habeas Corpus*, literally, Have you the Body. The phrase designates the most emphatic words of the writ, issued by a Judge or Court, commanding a person, who has another in custody, or in imprisonment, to have his body (Habeas Corpus) before the Judge or Court, at a particular time and place, and to state the cause of his imprisonment. The person, whether a sheriff, gaoler, or other person, is bound to produce the body of the prisoner at the time and place appointed; and, if the prisoner is illegally or improperly in custody, the Judge or Court will discharge him. Hence it is deemed the great security of the personal liberty of the citizen against oppression and illegal confinement. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 396 (1840).

Justice Story was hardly alone in holding that the writ was a "great security" for individual liberty. The writ was widely lauded on both sides of the Atlantic. William Blackstone, for example, said the writ of habeas corpus was "the most celebrated writ in English law." 3 Blackstone Commentaries 129.

Although the judiciary may not "second-guess" the Executive when the writ of habeas corpus has been suspended, this Court should firmly reject the Government's attempt to get around habeas review by employing the "enemy combatant" designation against citizens. The law of habeas corpus cannot be so easily evaded.

The Government's second argument is simply a variation of the first, and is basically a fall-back position. The claim is that Article III courts can "only require the military to point to some evidence supporting *its* [enemy combatant] determination." Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895) (Emphasis in original). The "evidence" means nothing in the context of habeas review if an Article III judge has no authority to examine it. The Government attempts to justify this improvised habeas procedure because this case involves the conduct of agents who report to the Executive's Secretary of Defense, not the Executive's Attorney General. This argument must also fail. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. . . . The very nature of the writ demands that it be administered with the initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969). In the words of Justice Holmes, "habeas corpus cuts through all forms."[4]

The Government is extending an invitation to this Court to "balance" the Executive's power to detain persons it perceives to be dangerous against a citizen's plea for a formal judicial hearing to argue that his detention is illegal. The Government proposes to strike that "balance" by submitting affidavits by a Pentagon official that purport to justify the prisoner's detention (the document in

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[4] *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). The principles advanced by Justice Holmes in his dissent were later adopted by this Court in *Moore v. Dempsey*, 261 U.S. 86 (1923).

this case is the "Mobbs Declaration.") If such a procedure is deemed constitutional, one could expect such affidavits to invariably accompany a Government motion to dismiss the prisoner's habeas petition summarily. But a petition should not be dismissed, on motion, where the court cannot determine the legality of the petitioner's confinement. *Corpus Juris Secondum,* Vol. 39A, § 302, pp. 64-65.

The problem with this line of argument is that the Constitution has already struck the "balance" at issue here.[5] Once the Government admits that the writ of habeas corpus has not been suspended, as it must, the law is clear. Habeas proceedings are habeas proceedings. And that means evidentiary hearings may well be required to properly consider habeas petitions in the military context. *See Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("[T]he power of inquiry on federal habeas corpus is plenary.") (citation and internal quotation marks omitted). And it most certainly means that a citizen must be able to meet privately with his attorney. It would be a mockery of justice to say that a prisoner's habeas corpus rights have been honored when the attorney preparing the petition has not even had the opportunity to meet with the

[5] To paraphrase Justice Scalia, the Government is urging an "interest-balancing" analysis where the text of the Constitution does not permit it. *See Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 65-66 (1991) (Scalia, J., dissenting) (noting that it would be a mistake to follow England's detention policies since British policymakers need not follow a higher law – that is, the American Constitution.) As this Court noted in *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

prisoner to hear his side of the story. The prisoner's "day in court" becomes farcical in such circumstances. How can the prisoner's attorney respond to the Government's allegations when he has not been given a chance to elicit any information or explanations from the prisoner? *See Harris* at 291-292.

B.

The Government is correct in arguing that – an American citizen who chooses to join enemy forces and fight against the U.S. military must live with the consequences of that decision. Such a person can be killed on the battlefield or, should he surrender, be taken into custody as a prisoner of war. Since the privilege of citizenship does not immunize a person from such battlefield captures, such persons need not be indicted with formal criminal charges. While a treason prosecution is certainly a possibility, such persons may also be detained as POWs.

The case of Gaetano Territo is instructive. *See In re Territo*, 156 F.2d 142 (1946). Mr. Territo was serving in the Italian Army during World War II when he was taken prisoner by the U.S. Army. After his capture, he was transferred from a prison facility in Italy to a prison facility on American soil. At some point after his arrival in the U.S., Mr. Territo filed a petition for a writ of habeas corpus. The gravamen of his petition was that, because he had been born in the U.S., his imprisonment on American soil, without formal criminal charges, was contrary to law.

The U.S. military, the Department of Justice, and the federal courts treated Mr. Territo's legal petition with respect. There was no dispute over the prisoner's access to counsel. And there was no dispute regarding the interplay

between the Executive's power to seize persons and the Court's power to review the legality of such seizures. Mr. Territo was able to meet with an attorney, and his legal counsel was able to present his grievance to an impartial Article III judge. The Government was, of course, afforded an opportunity to explain the circumstances of Mr. Territo's capture and to argue that his confinement was lawful and appropriate.

After due consideration, both the district court and the appellate court agreed with the Government that citizenship does not alter "the status of one captured on the field of battle." *In re Territo*, 156 F.2d 142, 145 (1946). Mr. Territo's petition for a writ of habeas corpus was thus properly considered and sensibly denied.

The petition that is at issue in this case was dismissed too casually.[6] The prisoner, Mr. Hamdi, has not been heard from. There is no need to burden this Court with a more detailed explanation as to why the ruling below rests upon a flawed foundation. That explanation has already been well-stated by Judge Luttig. *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (Luttig, J., dissenting from the denial of rehearing). This Court should reverse the ruling below and remand the case for further proceedings.

On remand, the prisoner must be allowed to consult with his attorney in a private setting. An evidentiary

[6] "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

hearing should then be held and the prisoner should have an opportunity to address the Court, and his counsel must have an opportunity to rebut the Government's allegations at the hearing. As in *Territo*, the Government should, of course, be given an opportunity to defend the legality of its actions.[7] If the Government can persuade an Article III judge that this detention is lawful and proper, Mr. Hamdi should be remanded to the military brig. If the Government is unable to persuade an Article III judge that this detention is lawful and proper, it has three options: (a) initiate criminal proceedings (where the full panoply of constitutional protections will be afforded the prisoner); (b) initiate deportation proceedings; or (c) release the prisoner from custody.

III. THE EXECUTIVE CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE SIXTH AMENDMENT

Because this appeal concerns the law of habeas corpus and the Executive's power to hold a citizen incommunicado, the Government's ubiquitous references to *Ex Parte Quirin*, 317 U.S. 1 (1942) are plainly inapposite.

[7] It is in *this* setting that the judiciary can and should make common sense distinctions between a police arrest and a military capture in a theater of war. This Court should not assume that Article III judges will abuse their discretion by discharging every prisoner who comes forward with a petition that says the U.S. military made a mistake. "But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

The *Quirin* ruling involved prosecution and trial procedures, not detention. And the single most important legal matter to note about *Quirin* is this: *The prisoners in that case did not contest their status as "enemy combatants." See Quirin* at 47 (noting that the petitioners in the case are "admitted enemy invaders.") *See also id.* at 46 (referring to the "conceded facts" in the case). In truth, the *Quirin* ruling does not extend to any situation in which a prisoner *contests* the Government's "enemy combatant" allegation. Despite the sweeping representations of the Government in its various filings, the precedential value of *Quirin* has been, and will continue to be, limited to its facts.

The right to trial by jury is guaranteed in explicit terms by the Sixth Amendment and is further bolstered by this Court's ruling in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, this Court recognized that even when the writ of habeas corpus is suspended, the Executive does not acquire the power to prosecute and execute prisoners. Rather, the suspension of the writ merely expands the power of the Executive to detain persons who are perceived to be dangerous. *See id.* at 125-126.

To be sure, the Government retains the prerogative to revive the unpersuasive arguments that were advanced by Attorney General Speed in his losing bid in the *Milligan* litigation, but such a course of action should be pursued openly and forthrightly. Unfortunately, the Government, in its zeal to change the law, has been misstating the law as it presently stands. Repeatedly, the Government invokes the *Quirin* ruling to conflate three distinct issues: seizure, detention, and prosecution. *Quirin* has no bearing on seizure and detention. And, to the extent that it deals with prosecution and trial procedure, it only applies to

prisoners who do not contest their status as "enemy combatants." Thus, as previously noted, it would be useful for this Court to clarify what has been settled and what remains unsettled as it crafts its ruling in the instant case. Such a clarification will be invaluable to lower courts as related cases arise.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

TIMOTHY LYNCH*
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200

**Counsel of Record*

No. 03-6696

IN THE

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS LISTED HEREIN IN SUPPORT OF PETITIONERS

DOUGLAS W. BARUCH*
DENEEN J. MELANDER
TIMOTHY K. HALLORAN
BRITTNEY NYSTROM
Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20004
(202) 639-7000

**Counsel of Record for Amici Curiae*

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

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INTEREST OF *AMICI CURIAE*

Amici are a group of international law professors united in their belief that, in order to uphold basic human rights, the legality of detention by the Executive must be subject to meaningful judicial review.[1] *Amici* are academic international law experts who have devoted significant time and attention to the importance of international human rights law in domestic contexts. They represent a wide range of experiences and backgrounds, including priests and ex-members of Congress. Many *Amici* are international human rights practitioners, who have litigated numerous international human rights cases. *Amici* also have published extensively and lectured on international human rights. *Amici* sign this brief in their individual capacities. Each *Amicus* has demonstrated a strong interest in ensuring respect of international human rights law in domestic courts.

The individual *Amici* are as follows: **William J. Aceves** is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. **Donna E. Arzt** is the Bond, Schoeneck and King Distinguished Professor of Law at Syracuse University College of Law and Co-Director of the school's Center for Global Law and Practice. **M. Cherif Bassiouni** is Professor of Law and President of the International Human Rights Institute at De Paul University. **Karima Bennoune** is Associate Professor of Law at Rutgers University School of Law, Newark. **Richard B. Bilder** is Foley & Lardner - Bascom Emeritus Professor of Law at the University of Wisconsin Law School. **Christopher L. Blakesley** is Professor of Law at the University of Nevada, Las Vegas, School of Law. **Carolyn Patty Blum** is Clinical Professor of

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[1] Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Law at the University of California at Berkeley. **Roger S. Clark** is Board of Governors Professor of Law at Rutgers University School of Law, Camden. **Anthony D'Amato** is Leighton Professor of Law at Northwestern University School of Law. **Connie de la Vega** is Professor of Law at the University of San Francisco School of Law. **Fr. Robert F. Drinan**, S.J., is Professor of Law at Georgetown University Law Center. **Valerie Epps** is Professor of Law and Director of the International Law Concentration at Suffolk University Law School. **Stephanie Farrior** is Professor of Law at the Pennsylvania State University, Dickinson School of Law. **Kenneth S. Gallant** is Professor of Law and Director of Clinical Programs at the University of Arkansas at Little Rock. **Ibrahim J. Gassama** is Associate Professor of Law at the University of Oregon School of Law. **Gunther Handl** is Eberhard Deutsch Professor of Public International Law at Tulane University School of Law. **Berta Esperanza Hernandez-Truyol** is Levin, Mabie & Levin Professor of Law at the University of Florida College of Law. **Craig L. Jackson** is Professor of Law at the Thurgood Marshall School of Law. **Hope Lewis** is a Professor of Law at Northeastern University School of Law. **Bert B. Lockwood** is Distinguished Service Professor and Director of the Urban Morgan Institute for Human Rights at the University of Cincinnati College of Law. **Linda A. Malone** is Marshall-Wythe Foundation Professor of Law at The College of William and Mary School of Law. **M. Nicole Morrison** is Clinical Instructor at the Texas Southern University School of Law. **James A.R. Nafziger** is Thomas B. Stoel Professor of Law and Director of International Law Programs at Willamette University College of Law. **Ved Nanda** is John Evans University Professor and Thomas G. Marsh Professor of Law at the University of Denver College of Law. **Daniel G. Partan** is Professor of Law and William Butler Scholar in International Law at Boston University School of Law. **Jordan J. Paust** is Law Foundation Professor at the University of Houston Law Center and Co-Director of the

International Law Institute. **Naomi Roht-Arriaza** is Professor of Law at the University of California Hastings College of Law. **Leila Sadat** is Professor of Law at Washington University St. Louis School of Law. **Beth Stephens** is Professor of Law at Rutgers University School of Law, Camden. **Fernando R. Tesón** is Tobias Simon Eminent Scholar at Florida State University College of Law. **Jon M. Van Dyke** is Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa. **Beth Van Schaack** is Assistant Professor of Law at Santa Clara University School of Law. **Jeanne M. Woods** is Henry F. Bonura, Jr. Distinguished Professor of Law at Loyola University School of Law, New Orleans.

SUMMARY OF ARGUMENT

This Court has made clear that international law constitutes an integral part of United States law, both as a matter of this country's treaty obligations and customary law. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900). Adhering to this principle, this Court's previous deliberations and rulings on matters pertaining to wartime detainee rights have been informed by relevant provisions of international law. Moreover, from its earliest decisions, this Court steadfastly has held that, whenever possible, United States law must be interpreted in accord with international law. Before the Court now is a matter involving constitutional and human rights as applied to a wartime detainee. Thus, as set forth in Section I below, *Amici* respectfully submit that international law should be an essential element of this Court's deliberations in this case.

When it undertakes the requisite international law inquiry, the Court will find that the human rights instruments of civilized nations, and the precedent of the tribunals entrusted to uphold them, uniformly provide that detention of individuals under authority of the executive is subject to meaningful judicial review. Indeed, without exception, human rights law guarantees the right not to be arbitrarily

detained, and the necessarily related right to meaningful judicial review to ensure that any detention is lawful, even in the face of terrorist threats or national emergency. Notably, these widely recognized human rights are not unique to international law; rather, they are entirely consistent with the vital system of checks and balances underpinning our own constitutional structure, ensuring the protection of individual liberties. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946); *United States v. Robel*, 389 U.S. 258, 263-64 (1967).

Departing from these principles, the Fourth Circuit's decision below effectively holds that "further judicial inquiry is unwarranted" once the Executive proclaims to a reviewing court that the detainee seeking such review – in this case a United States citizen – is an "enemy combatant." *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003). Under that ruling, Yaser Esam Hamdi ("Petitioner"), an American citizen, may be detained indefinitely, virtually incommunicado[2] and without meaningful judicial review, subject only to the discretion of the Executive. The implications of placing such enormous, unchecked authority over a citizen's liberty in the hands of the Executive are as grave as they are startling.

As set forth in Section II below, *Amici* maintain that this Court must not sanction such a bold interpretation of essentially absolute Executive power over citizen detainees, even in times of war. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power

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2 After detaining Petitioner for nearly two years, incommunicado and without access to counsel, the government permitted Petitioner to meet with a lawyer on December 2, 2003. The United States, however, has not conceded that Petitioner has any "right" to counsel; instead, the government made clear that Petitioner could meet with counsel only "as a matter of discretion and military policy," and that such meeting "should not be treated as precedent." *See* Jerry Markon & Dan Eggen, *U.S. Allows Lawyer For Citizen Held as 'Enemy Combatant'; Reversal Comes on Eve of Court Filing*, Wash. Post, Dec. 3, 2003, at A1.

does not remove constitutional limitations safeguarding essential liberties."). Mindful of international law regarding human rights, this Court should not yield to the Executive unfettered discretion to impair the human rights of an American merely by affixing – without any meaningful judicial review – an "enemy combatant" label to that citizen. For, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). Thus, *Amici* submit that the decision of the Fourth Circuit should be reversed and remanded.

ARGUMENT

I. INTERNATIONAL LAW IS PART OF UNITED STATES LAW

From the inception of our nation and of this Court, it has been recognized that international law, pursuant to both treaties and customary law, is part of United States law. Under the Constitution, international treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). Likewise, for over two centuries, domestic common law has incorporated customary international law. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("This is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since ...."). [3]

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3 *See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) ("the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed"); 1 Opp. Att'y Gen. 26, 27 (1792) ("The law of

Indeed, this Court has stated explicitly that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 111, reporters' note 4 (1987) (hereinafter the "Restatement") ("international law is 'part of our law' . . . and is federal law") (citation omitted).[4] Thus, "[c]ases arising under treaties to which the United States is a party, as well as cases arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution." Restatement § 111 cmt. e; *see also Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809).

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nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation."); Jordan J. Paust, *International Law as Law of the United States* 7-16 (2d ed. 2003) (hereinafter "Paust, *International Law*"); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l L. 301, 301 (1999) ("The Founders clearly expected that the customary law of nations was binding, was supreme law, created . . . private rights and duties, and would be applicable in United States federal courts.") (collecting authorities); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations.").

[4] This Court has looked to the Restatement for guidance, and cited it with approval, on numerous occasions. *See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 421 n.3 (2001); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

The judiciary, therefore, has the ability to remedy violations of international law, especially where human rights are at stake. As Chief Justice Marshall recognized nearly two centuries ago, our judicial tribunals "are established . . . to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810); *see also* Paust, *International Law* at 207-29. The judiciary's responsibility to vindicate human rights norms firmly embedded in the laws of civilized nations cannot and does not end upon the Executive's unchallenged assertion that a United States citizen detainee merits an "enemy combatant" designation. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 376 (4th Cir. 2003) (Motz, J., dissenting from denial of reh'g en banc) ("The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and 'more subtle blow to liberty.' . . . As Justice Jackson warned, when the Executive 'overstep[s] the bounds of constitutionality, . . . it is an incident,' but when the court 'review[s] and approve[s], that passing incident becomes the doctrine.'") (quoting *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting)).[5]

A. This Court Has Examined International Law In Comparable Circumstances

In previous cases concerning wartime detainee rights, this Court demonstrated the relevance of international law. For example, in *Ex Parte Quirin*, 317 U.S. 1 (1942), in considering the constitutionality of an American detainee's trial by a military commission, the Court acknowledged that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of

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[5] *See also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 518-24 (2003) (hereinafter "Paust, *Judicial Power*").

enemy individuals." *Id.* at 27-28; *see also* Paust, *Judicial Power* at 518-24, and cases cited therein.[6] Similarly, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in determining whether a German national convicted by a United States military commission could pursue habeas relief, the Court extensively reviewed the then-relevant rules of international law to ensure that they would not be violated by its decision. *See id.* at 785 (noting "[t]he practice of every modern government"), 786 (citing treaty law), 787-88 (citing Hague Regulations and secondary sources on international law).[7]

While the substantive body of international law has changed since *Quirin* and *Eisentrager*, the approach of examining the relevant provisions of international law remains correct. As Justice O'Connor has asserted, "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, in International Law Decisions in National

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6 In *Quirin*, "the Court did hold that for a violation of the laws of war, even an American citizen could be treated as an 'enemy combatant' and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*" *Hamdi*, 337 F.3d at 369-70 (Motz, J., dissenting from denial of reh'g en banc) (emphasis in original). In contrast, Petitioner has been afforded no ability to contest the Executive's claims regarding his status, and only recently – and purely as a matter of Executive discretion – has he been afforded some limited access to counsel.

7 As in *Quirin* – and unlike Petitioner's case – a military commission tried the *Eisentrager* petitioners in an adversarial proceeding. *See* 339 U.S. at 766. Thus, *Eisentrager* concerned post-conviction habeas relief – *i.e.*, after a tribunal had considered the legality of detention. Although the *Eisentrager* Court limited access to a second tier of review, it never held that the Executive could deny petitioners *any* meaningful judicial review.

Courts 13, 18 (T. Franck & G. Fox eds., 1996).[8] Under this precedent and guidance, analysis of international law is appropriate and necessary in deciding the instant case.

B. Barring Exceptional Circumstances, United States Law Should Be Interpreted In A Manner Consistent With International Law

Wherever possible, United States law should be construed in a manner that does not conflict with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (sometimes called the "*Charming Betsy*" rule); *see also Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law"); Restatement §§ 114, 115.

This Court has relied on the so-called *Charming Betsy* rule on numerous occasions. For example, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Court interpreted the National Labor Relations Act in the maritime context so as not to run afoul of a "well-established rule of international law." *Id.* at 21; *see also id.* at 19 (noting that a contrary decision "would raise considerable disturbance not only in the field of maritime law but in our international relations as well"). Likewise, in *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court relied upon the rule, and international law, to interpret a statute prohibiting discrimination against United States citizens on military bases overseas. *Id.* at 29-32; *see also Lauritzen v. Larsen*, 345 U.S.

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8 *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999) ("In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.").

571, 578 (1953) (applying the *Charming Betsy* rule and international law in a maritime tort case to interpret the Jones Act).

Even in cases not directly implicating international law, recent Court decisions underscore the importance of respecting the "values we share with a wider civilization." *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (citing decisions of the European Court of Human Rights); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting the consensus opinion of "the world community"). Thus, in deciding the present case, international law is applicable and the Court should strive to construe domestic laws in a manner consistent with international human rights laws and principles.

II. INTERNATIONAL HUMAN RIGHTS LAW PROVIDES FOR INDEPENDENT, FAIR, EFFECTIVE, AND MEANINGFUL JUDICIAL REVIEW OF EXECUTIVE DETENTION

By treaty and customary law, international human rights law[9] recognizes the right of persons to be free from arbitrary detention, and the concomitant right to meaningful judicial review to ensure that any detention is lawful.[10] *See Alvarez-*

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9 International human rights law applies alongside international humanitarian law, sometimes called the "law of war." *See generally* Brief of *Amici Curiae* Experts on the Law of War in Support of Petitioners.

10 *See, e.g.*, Paust, *Judicial Power* at 507-10, 514 (discussing human rights standards during peacetime, national emergency or war). Although the Fourth Circuit used the phrase, "meaningful judicial review," 316 F.3d at 461, the record reflects that Petitioner in fact had no ability to contest the facts set forth in the government declaration relied upon by the court. *See* 337 F.3d at 358 (Luttig, J., dissenting from denial of reh'g en banc) ("[The panel] promised the citizen seized by the government [petitioner] 'meaningful judicial review' . . . [b]ut it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant."); *id.* at 373 (Motz, J., dissenting from denial of reh'g en banc) ("although the panel steadfastly maintains that it engages in a 'meaningful judicial review,' . . . its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review.").

Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003) (en banc), ("[Under international law,] there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions."), *cert. granted*, 124 S. Ct. 821 (2003) (citing M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993)); *see also* Paust, *Judicial Power* at 504 ("human rights law applicable in all social contexts, including times of national emergency and war, prohibits arbitrary detention of persons and requires the availability of judicial review of the propriety of detention").[11]

Detention is "arbitrary," and thus violative of human rights, when "'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (quoting Restatement § 702 cmt. h). The Restatement makes clear that detention is arbitrary where "the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time." Restatement § 702 cmt. h. Here, detaining Petitioner indefinitely under authority of the Executive, without the right to counsel for nearly two years, and without meaningful judicial review of the Executive's asserted bases for

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11 As Alexander Hamilton proclaimed, "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny." Alexander Hamilton, *The Federalist No. 84*, at 533 (Benjamin Fletcher Wright ed., 1961).

detention, is untenable under international law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .").

A. The International Covenant on Civil and Political Rights Provides for Independent, Fair, Effective, and Meaningful Judicial Review

The United States has ratified the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368[12] which prohibits arbitrary detention and requires meaningful judicial review of the lawfulness of detention.[13] Article 9(1) of the treaty provides:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on grounds and in accordance with such procedure as are established by law.

In order to safeguard these rights, Article 9(4) adds the guarantee of meaningful judicial review:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14(1) also underscores the ICCPR's protections, generally granting access to courts for a judicial determination of rights: "[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal." *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) (noting that "[Article 14(1) is] aimed at ensuring the proper administration of justice, and to this end uphold[s] a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing") (citation omitted).

Because of the vital nature of the rights at stake, the ICCPR's protections – including the right to meaningful judicial review of detention – apply even in times of national emergency. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 239 (July 8), *reprinted in* 35 I.L.M. 809, 820 (1996) ("the protection of the [ICCPR] does not cease in times of war"). Indeed, the United Nations' Human Rights Committee (the "Human Rights Committee"), the panel of experts established to monitor ICCPR implementation, has stated:

> [T]he principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency. . . . In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of

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[12] The United States ratified the ICCPR in 1992. *See* 138 Cong. Rec. S4781-01 (Apr. 2, 1992). Including the United States, 151 States have ratified the treaty. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (Nov. 2, 2003), *available at* http://www.unhchr.ch/pdf/report/pdf.

[13] The United States' obligation to lead by example in the international arena was a driving force behind its ratification of the ICCPR in 1992, as evidenced by the Senate Committee's report:

> In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.

S. Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights (ICCPR), 31 I.L.M. 645 (May 1992) *reproduced from* S. Exec. Rep. 102-23 (102d Cong., 2d Sess.).

detention, must not be diminished by a State party's decision to derogate from the Covenant.[14]

U.N. H. R. Comm., General Comment No. 29, ¶ 16 ("General Comment 29"), 1950th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).[15] Thus, the ICCPR contemplates that, when the lawfulness of detention is in question, courts should engage in a prompt and thorough review to ensure that such detention does not violate basic human rights.[16]

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[14] While the right to meaningful judicial review of detention implicitly is derogable under the ICCPR, a State may not simply derogate at its convenience. Rather, "[i]n a time of public emergency which threatens the life of the nation," State parties may derogate from their obligations under the treaty, but "only to the extent strictly required by the exigencies of the situation," and "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour [sic], sex, language, religion or social origin." ICCPR art. 4(1). In order to derogate from the ICCPR, formal procedures must be followed: "Any State Party . . . availing itself of the right of derogation shall immediately inform the other States Parties to the [ICCPR], through the intermediary of the Secretary-General of the United Nations, of the provision from which it has derogated and the reasons [therefore]." *Id.* art. 4(3). Here, the United States formally has not sought to derogate from its obligations under Article 9. Thus, the terms of the treaty should be respected. *See also* Paust, *Judicial Power* at 509 (citing sources and explaining: "[a] strong argument exists that, notwithstanding this language [of Article 4], no circumstances should ever 'strictly require' the denial of judicial review of detention").

[15] *See also* General Comment 29 at ¶¶ 3, 9, 11, n.6; Concluding Observations of the H. R. Comm.: Israel, 63rd Sess., U.N. Doc. CCPR/C/79/Add.93, at ¶ 21 (1998) ("a State party may not depart from the requirement of effective judicial review of detention"); Paust, *Judicial Power* at 506 n.5 (stating that the right against arbitrary detention and the right to judicial review apply in times of war).

[16] Any dispute over whether Article 9 of the ICCPR is self-executing would be misguided for present purposes. While the Senate, in ratifying the ICCPR, declared that certain provisions, including Article 9, were not

Where persons have been detained arbitrarily without access to meaningful judicial review, the Human Rights Committee consistently has found ICCPR violations. For example, in *Vuolanne v. Finland*, Views of the H.R. Comm. under art. 5, ¶ 4, of the Optional Protocol to the ICCPR, 35th

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self-executing, *see* 138 Cong. Rec. S4781-01 (Apr. 2, 1992), the United States did not add any reservations, conditions, or understandings specifically to Article 9. Furthermore, Article 9 involves matters of habeas corpus review, as to which the federal habeas statute expressly provides relief to any person held in "custody in violation of the . . . *treaties* of the United States," thus executing Article 9 for habeas purposes. 28 U.S.C. § 2241(c)(3) (emphasis added). The Executive intent with respect to the non-self-execution declaration was to preclude a direct cause of action under the ICCPR, a theory not relevant in this case. Also, the non-self-execution declaration does not apply to Article 50 of the ICCPR, which mandates: "The provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions." *See, e.g.*, Paust, *International Law* at 361-65. Thus, the treaty can be used defensively and for habeas purposes. *See id.* at 362, 374, 379-80 n.2. Similarly, the Fourth Circuit erred in determining whether certain rights under the Geneva Conventions are self-executing, and by ignoring their possible use defensively and through -- i.e., as executed by -- the federal habeas statute. See, e.g., Paust, Judicial Power at 515-17.

Further, even if the ICCPR is not directly applicable, the Court may take notice of the United States' obligations under the treaty. As the State Department has made clear, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives, thereof, as well as to the stated policy reasons for ratification." Consideration of Reports Submitted By States Parties Under art. 19 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment: United States, Comm. Against Torture, U.N. Doc. CAT/C/28/Add.5, (2000) at ¶ 57; *see also* Consideration of Reports Submitted by States Parties Under art. 40 of the ICCPR: United States, H.R. Comm., U.N. Doc. CCPR/C/81/Add.4, Aug. 24, 1994 ("This declaration [that Articles 1 through 27 are not self-executing] did not limit the international obligations of the United States under the Covenant. . . . [T]he fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases.").

Sess., Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/265/1987 (1989), a Finnish soldier left his unit without permission and, upon his return, was placed in confinement. The supervising military officer rejected without a hearing the soldier's attempt to plead his case. *Id.* at ¶ 2.3. Upon his release, the soldier claimed that his detention without meaningful judicial review violated, *inter alia*, Article 9(4) of the ICCPR. The Human Rights Committee agreed, explaining that whenever a person is deprived of liberty, "there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law." *Id.* at ¶ 9.6. Rejecting the Finnish government's argument that a decision by a military officer without a hearing satisfied Article 9(4), the Human Rights Committee emphasized the requirement that judicial review be *meaningful*:

> The procedure followed in the case of Mr. Vuolanne did not have a judicial character, the supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a 'court' . . . therefore, the obligations laid down [in the ICCPR] have not been complied with by the authorities of the State party.

Id. Because the soldier was "unable to challenge his detention before a court," the Human Rights Committee found a violation of Article 9(4). *Id.* at ¶ 10.

Similarly, in *A v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Communication No. 560/1993, 59th Sess., U.N. Doc. CCPR/C/59/D/560/1993 (1997), the Australian government detained a person for approximately four years, pending a determination of his refugee status, during which time he had limited access to the courts. *See id.* at ¶ 9.5. Before the Human Rights Committee, the detainee claimed that his prolonged detention without access to meaningful judicial review was arbitrary and violated the ICCPR. The Human Rights Committee agreed, finding an Article 9(1) violation

because the State had not sufficiently justified the prolonged nature of the detention. *Id.* at ¶ 9.4. Underscoring the right to meaningful judicial review, the Committee also stated that, "[w]hile domestic legal systems may institute differing methods for ensuring court review of [governmental] detention, what is decisive for purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal." *Id.* Because Australia denied the detainee this fundamental right, the Human Rights Committee found a violation of Article 9(4). *Id.* ¶ 10; *see also Hammel v. Madagascar*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Supp. No. 40, Communication No. 155/1983, U.N. Doc. A/42/40 at 130, ¶ 20 (1987) (finding Article 9(4) violation where suspected spy was detained incommunicado prior to deportation because detainee "was unable to take proceedings before a court to determine the lawfulness of his arrest").

The ICCPR's text and the Human Rights Committee decisions construing the treaty make clear that, in order to protect basic human rights, (1) ICCPR signatories must provide detainees with meaningful judicial review, and (2) such judicial review must include the opportunity to challenge the facts supporting the detention in a proceeding that is "real and not merely formal." The Fourth Circuit's reasoning improperly denies Petitioner these most basic, universal, and fundamentally fair protections.

B. Customary International Law Provides for Independent, Fair, Effective, and Meaningful Judicial Review

1. International Human Rights Instruments Uniformly Protect Persons Against Arbitrary Detention and Guarantee Meaningful Judicial Review

The ICCPR protections are not unique to that treaty. Indeed, the right against arbitrary detention and the attendant right to judicial review are entrenched firmly in a myriad of

international human rights instruments and authorities. As our own domestic courts have observed, "[e]ach of the regional human rights instruments" contain similar provisions. *Alvarez-Machain*, 331 F.3d at 621 n.17; *see also de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens.") (citations omitted) (emphasis in original); Restatement § 702 cmt. h (stating that state-sanctioned, prolonged and arbitrary detention violates customary law, and that even a "single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate" international law).[17]

The Universal Declaration of Human Rights (the "Universal Declaration"), "perhaps the most well-recognized explication of international human rights norms," *Alvarez-Machain*, 331 F.3d at 620-21, provides that, "[n]o one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, art. 9, G.A. Res. 217A, III U.N. GAOR, U.N. Doc. A/810 (1948).[18] The Universal

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17 *See also* 22 U.S.C. § 2151n(a) (stating that no assistance may be given to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges"); 7 U.S.C. § 1733(j); 22 U.S.C. §§ 262d(a), 2304.

18 The Universal Declaration also has been described as "'an authoritative statement of the international community.'" *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (quoting E. Schwelb, *Human Rights and the International Community* 70 (1964)).

Declaration guarantees this right by providing that, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* art. 10.[19]

The American Convention on Human Rights (the "American Convention"), Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, which the United States and more than twenty other State parties have signed,[20] similarly prohibits arbitrary arrest or imprisonment, *id.* art. 7(3), and provides that, "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time . . . ." *Id.* art. 7(5). Further, the American Convention states: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention . . . ." *Id.* art. 7(6).

Likewise, the American Declaration of the Rights and Duties of Man (the "American Declaration"),[21] May 2, 1948,

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19 As President Reagan declared, "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." *Proclamation of Bill of Rights Day*, Human Rights Day and Week, U.S. Dep't of State, Selected Documents No. 22 (Dec. 9, 1983).

20 Although the United States has signed – but not ratified – the American Convention, it is nevertheless obligated by law to refrain from acts that would defeat the object and purpose of the instrument. *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . .").

21 As a member of the Organization of American States, the United States must respect the terms of the American Declaration.

reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OEA/Ser.L.V./II.82 doc.6 rev.1 (1992), provides:

> No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released.

Id. art. XXV.[22]

The same fundamental protections obtain under the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), Nov. 4, 1950, 213 U.N.T.S. 221, which binds every European Union member.[23] That treaty, like its American counterparts, guarantees that anyone "deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court . . . ." *Id.* art. 5(4).[24]

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22 The American Declaration also provides robust protection for civil rights under all circumstances: "*Every person* has the right to be recognized *everywhere* as a person having rights and obligations, and to enjoy the basic civil rights." *Id.* art. XVII (emphasis added).

23 There are more than forty State parties to the European Convention.

24 *See also* African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (Art. 6: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Art. 7(1): "Every individual shall have the right to have his cause heard[, including] the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations, and customs in force . . . ."); U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 32, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988).

Thus, the key instruments of international human rights law have reaffirmed, consistently and with remarkable clarity, the right of meaningful judicial review, precluding the exercise of unilateral power that the Executive claims in this case.

2. Regional Human Rights Courts Have Upheld the Right Against Arbitrary Detention by Providing Meaningful Judicial Review

The basic human rights and protections outlined above have not been ignored by the regional bodies entrusted to uphold them. Instead, international human rights tribunals have worked diligently to secure the right against arbitrary detention – even in the face of terrorism and national security concerns – by ensuring access to the courts, and providing meaningful judicial review.

Decisions by the European Court of Human Rights (the "ECHR"), which this Court found to be of persuasive value as recently as last term, are especially apposite.[25] In *Aksoy v. Turkey*, App. No. 21987/93 (Eur. Ct. H.R. Dec. 18, 1996), for example, the ECHR directly addressed the executive's detention of a suspected terrorist under Article 5 of the European Convention.[26] In *Aksoy*, the Turkish government detained a suspected terrorist for fourteen days without a lawyer or access to the courts. The government defended the detention under Article 5, asserting that terrorist acts recently had killed hundreds of civilians and members of the security forces, creating a "threat to the life of the nation." *Id.* at ¶ 31.

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25 *See Lawrence*, 123 S. Ct. at 2483.

26 Aksoy alleged a violation of Article 5(3) of the European Convention. That provision, similar to Article 5(4), provides: "Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . ."

Rejecting that excuse, the court explained that, in times of emergency when national security concerns are heightened, "a wide margin of appreciation should be left to the national authorities," but that "Contracting Parties [to the European Convention] do not enjoy an unlimited discretion." *Id.* at ¶ 68. Considering the balance between national security and fundamental liberties, the court emphasized "the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty." *Id.* at ¶ 76. Thus, acknowledging that "the investigation of terrorist offences undoubtedly presents the authorities with special problems," *id.* at ¶ 78, the court held that "[*j*]*udicial control of interferences by the executive with the individual's right to liberty is an essential feature . . . to minimize the risk of arbitrariness and to ensure the rule of law*." *Id.* at ¶ 76 (emphasis added). Because Aksoy had been held incommunicado, without a lawyer, and without access to a court to test the legality of his detention – *i.e.*, "completely at the mercy of those holding him" – the ECHR found an Article 5 violation. *Id.* at ¶ 83-84.

Similarly, in *Al-Nashif v. Bulgaria*, App. No 50963/99 (Eur. Ct. H.R. June 20, 2002), the Bulgarian government detained a Muslim suspected of practicing fundamentalist Islam and associating with terrorist groups for twenty-six days, incommunicado, before deporting him. *Id.* at ¶¶ 3, 31, 53-58. This government, too, cited national security concerns to justify the detention in the face of claims that such conduct violated Article 5(4) of the European Convention (guaranteeing the right of judicial review). *See id.* at ¶¶ 83, 90. Upholding the petitioner's claim, the court explained:

> [E]veryone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of detention. The [European] Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the

> context of . . . provid[ing] safeguards against arbitrariness . . . . The person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation.

Id. at ¶ 92. Rejecting the government's argument that national security concerns trumped the detainee's basic human rights, the court stated, "[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved." *Id.* at ¶ 94.[27]

Like the ECHR, the Inter-American Court of Human Rights (the "IACHR"), has upheld the right to be free of arbitrary detention and to obtain access to judicial review.[28] In *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52 (May 30, 1999), the IACHR considered potential

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27 *See also Brogan and others v. United Kingdom*, App. Nos. 11209/84, et al., at ¶¶ 58-60 (Eur. Ct. H.R. Nov. 29, 1988) (emphasizing need for judicial control over detention imposed by the executive, and holding that Article 5 violated where suspected terrorists were not "brought before a judge or judicial officer during [their] time in custody"); *G.B. v. Switzerland*, App. No. 27426/95, at ¶ 38 (Eur. Ct. H.R. Nov. 30, 2000) (finding European Convention violated where suspected terrorist was detained without judicial review: "it is for the State to organize its judicial system in such a way as to enable its courts to comply with the requirements of [Article 5(4)]"); *Wintwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A), at ¶¶ 60-61 (1979) ("[I]t is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty.' . . . [Because petitioner was not] heard by the courts or given the opportunity to argue his case[,] . . . the guarantees demanded by Article [5(4)] of the Convention were lacking both in law and in practice.").

28 Decisions of the IACHR have particular relevance here because the United States is a member of the Organization of American States, and a prominent leader in the region.

violations of Article 7 of the American Convention by Peru when it detained several citizens, incommunicado, before ultimately sentencing them to life in prison for aggravated terrorism. Finding that terrorism-related concerns did not justify denying the detainees their right to judicial access under Article 7(5), the IACHR held that "the period of approximately 36 days . . . between the time of detention and the date on which the [petitioners] were brought before a judicial authority [was] excessive and contrary to the provisions of the Convention." *Id.* at ¶ 111.

Additionally, in *Castillo Petruzzi*, the IACHR considered whether a local law denying the writ of habeas corpus to suspected terrorists violated the American Convention. *See id.* at ¶¶ 180-82. Holding that legitimate concerns regarding terrorism could not validate such a law under the Convention, the IACHR stressed that judicial review must be available *and* meaningful:

> [T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, *for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.*

Id. at ¶ 185 (emphasis added). Noting that habeas corpus is one of the "essential judicial guarantees not subject to derogation or suspension," the IACHR found that the government's local practice violated the American Convention. *Id.* at ¶¶ 187-88; *see also Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (holding that "arbitrary detention, which deprived [petitioner] of his physical liberty without legal cause and without determination of the lawfulness of his detention by a judge or competent tribunal . . . directly violate[d] the right to personal

liberty recognized by Article 7 of the [American] Convention").

In light of the consistency among international human rights tribunals, it has been aptly observed that, "[s]uch widespread [agreement] and the *jus cogens*[29] nature of the right to freedom from arbitrary detention[,] affirm the nonderogability of judicial review and therefore require that the [United States'] executive branch may not exercise its discretion without independent, fair, and effective judicial review." Paust, *Judicial Power* at 510.[30] *Amici* fully support this principle and urge that it be applied in this case.

CONCLUSION

International law demands adherence to the fundamental human right to meaningful judicial review of Executive detention, even in times of war. Here, this Court has the opportunity to reaffirm this critical principle. As Judge Motz eloquently stated in dissent below, this Court must not "allow[] . . . deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role:

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29 The term "jus cogens" refers to a category of peremptory norms that are accepted and recognized by the international community of states as a whole and from which no derogation is permitted. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Seiderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

30 *See also* Report of the Special Rapporteur of the Comm. on H.R. on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173, (2002) at ¶ 18 (U.N. official surveying international human rights law and reporting that, "in accordance with international law, and as confirmed by States' practice, the following basic legal safeguards should remain . . . in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: the right to habeas corpus, the right to have access to a lawyer within 24 hours from the time of arrest and the right to inform a relative or friend about the detention").

protection of the individual freedoms guaranteed all citizens." *Hamdi*, 337 F.3d at 369 (Motz, J., dissenting from denial of reh'g en banc). *Amici* respectfully submit that, in order to vindicate the vitally important rights at stake here, this Court should reverse the Fourth Circuit and confirm the need for meaningful judicial review.

Respectfully submitted,

DOUGLAS W. BARUCH*
DENEEN J. MELANDER
TIMOTHY K. HALLORAN
BRITTNEY NYSTROM

Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20004
(202) 639-7000

**Counsel of Record for Amici Curiae*

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In The
Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD,
W.R. PAULETTE, Commander,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF INTERNATIONAL HUMANITARIAN ORGANIZATIONS AND ASSOCIATIONS OF INTERNATIONAL JOURNALISTS AS *AMICI CURIAE** SUPPORTING PETITIONERS

STEVEN M. PESNER, P.C.
Counsel of Record

JAMES J. BENJAMIN, JR.
MICHAEL SMALL
JEFFREY P. KEHNE
NATASHA G. KOHNE

AKIN GUMP STRAUSS HAUER & FELD, LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Counsel for Amici Curiae International Humanitarian Organizations and Associations of International Journalists

*Individual *Amici* Listed On Cover

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are non-profit humanitarian relief organizations and associations of international journalists whose staff and members are regularly called upon to work in zones of active military combat. At times, relief workers and journalists are mistakenly detained by armed forces operating in combat zones. The Fourth Circuit's ruling that persons detained as "enemy combatants" by United States armed forces in zones of active military combat have no right to a status determination by a competent tribunal under the Geneva Convention and no right under domestic law to meaningful judicial review of the factual basis for their detention poses grave concerns to *amici*. *Amici* take no position on whether petitioner Hamdi has committed acts that warrant treatment as an enemy combatant, nor whether Petitioner is actually a prisoner of war.

AmeriCares is a non-profit disaster relief and humanitarian aid organization that provides immediate response to emergency medical needs and supports long-term humanitarian assistance programs for all people around the world.

CARE USA is a non-profit international humanitarian organization committed to helping families in poor communities improve their lives and achieve lasting victories over poverty.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The International Rescue Committee is a non-profit, non-sectarian, voluntary agency providing assistance to refugees, displaced persons and others fleeing persecution and violent conflict.

Committee to Protect Journalists is a non-profit organization that promotes press freedom worldwide by defending the right of journalists to report the news without fear of reprisal.

Reporters Without Borders is a non-profit organization dedicated to defending the freedom of the press and journalists' safety and rights.

INTRODUCTION

In sustaining the President's assertion of unilateral power to designate anyone detained by the U.S. military in a zone of active military combat an "enemy combatant," the Fourth Circuit panel below acknowledged that "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003) (*Hamdi III*). Nevertheless, the panel accepted Respondents' sweeping assertion that the Judicial Branch should play no role in uncovering and correcting mistakes made by the Executive in its enemy combatant designations. As Judges Luttig and Motz admonished in their dissents from the denial of rehearing *en banc*, the panel's regime of unfettered executive discretion poses serious consequences for the large numbers of international humanitarian relief workers and journalists lawfully operating in areas of armed military conflict worldwide.

As Judge Luttig astutely observed, it is far from idle speculation that a journalist or other innocent third party could be mistakenly seized and detained in a foreign combat zone. As he suggested, these risks are all too plausible given that the theater of the United States' current war on terror "is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state." *Hamdi v. Rumsfeld*, 337 F.3d 335, 358 (4th Cir. 2003) (*en banc*) (*Hamdi IV*). Echoing that concern, Judge Motz noted the "chilling" ramifications of the ruling below: "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an 'enemy combatant.'" *Id.* at 372 (footnote omitted).

Responding to Judges Luttig and Motz, one of the authors of the Fourth Circuit panel opinion, Judge Traxler, wrote in his opinion concurring in the denial of rehearing *en banc* that the panel opinion was grounded in a presumption that *anyone*, "regardless of nationality," who is present in an enemy combat zone during war is a belligerent and an enemy of the United States. *Id.* at 351. Under this view, journalists and relief workers who are mistakenly detained as enemy combatants are simply reaping what they have sown by choosing to be present in a zone of combat. *See id.* at 352 ("American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one.").

This view is short-sighted at best, and fails to acknowledge the profoundly important work that is performed each day by international aid workers and journalists around the world and especially in zones of military combat. The Fourth Circuit panel's decision, which presented a false dichotomy between an all or nothing judicial process, severely compromises the ability of journalists and relief organizations to carry out their missions. *Amici* urge this Court to reverse that decision.

ARGUMENT

Though perhaps appropriate to the era in which it was formulated, the presumption of belligerence that animated the Fourth Circuit's decision has markedly less force with respect to conflict in our age. Humanitarian relief workers and international journalists are very much a part of this new world of porous borders and ill-defined battlefields. Large numbers of them are active in unstable areas of the world, including areas of recent U.S. military activity. They are present in combat zones not by choice, but by necessity, carrying out their vital work, and hardly fit the presumption of belligerence underpinning the Fourth Circuit's decision. As shown by recent examples, their active presence in combat zones puts them at risk of being mistakenly detained by the military. The Fourth Circuit's decision would deprive relief workers and journalists of any judicial process to protect them from indefinite detention, even in cases where that detention is the product of erroneous assumptions, mistaken perceptions, sheer arbitrariness, or other motivations.

I. Humanitarian Relief Organizations And Journalists Serve Vitally Important Roles In Areas of Conflict

A. Relief Workers And Journalists Are Active In Conflict-Ridden Areas

Humanitarian relief organizations provide critical services to people in need all around the globe – from disaster relief to refugee assistance to health and education programs. These services are particularly important in areas beset by armed conflict, man-made disasters that call for a humanitarian response. Sadly, armed conflict continues to riddle the world. As this brief is being filed, U.S. troops are daily engaged in high-risk operations in Iraq and Afghanistan. In addition, Colombia, Nepal, Burundi, the Central African Republic, Cote d'Ivoire, the Democratic Republic of the Congo, Sudan, and Uganda are all recognized areas of armed conflict today.[2] Additional nations suffer from acts of terrorism, including Kuwait, Yemen, Indonesia, Kenya, and Pakistan.[3] These conflicts have created an enormous population of refugees and internally-displaced persons. There are over 10 million refugees world-wide and as many as 25 million internally-displaced persons, with

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[2] Executive Committee of the High Commissioner's Programme, Safety and Security, EC/53/SC/CRP.5 (Standing Committee, 26th meeting February 10, 2003), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+mwwBm9Ye06mwwwwnwwwwwwwhFqh0kgZTtFqnnLnqAFqh0kgZTcFqB5whnBOawDma5nq1GoBODzmxwwwwwww1FqmRbZ/opendoc.pdf (accessed February 20, 2004).

[3] *Id.*

major concentrations in central and western Africa, the Balkans, Colombia, Sri Lanka, and former Soviet states.[4]

Seeking to alleviate the misery and suffering that are inevitable by-products of armed conflict, InterAction, the largest alliance of U.S-based international development and humanitarian non-governmental organizations, has 160 member organizations operating in every developing country in the world.[5] InterAction members are particularly active in nations beset by warfare, including areas where U.S. forces have been deployed.[6] In 2002, twenty-nine InterAction member organizations reported active or planned relief and development operations in Afghanistan and Pakistan.[7] Eighteen had active or planned operations in Iraq, with forty-one organizations operating in the

[4] United Nations High Commissioner for Refugees, Refugees by Numbers 2003, p. 5, *available at* http://www.unhcr.org.uk/info/briefings/statistics/documents/numb2003.pdf (accessed February 20, 2004).

[5] *See* http://www.interaction.org/about/index.html (accessed February 20, 2004).

[6] *See generally* InterAction Member Activity Report: Colombia (May 2002) (Colombia Report); InterAction Member Activity Report: Afghanistan (May 2002) (Afghanistan Report); InterAction Member Activity Report: The Great Lakes (December 2003) (Great Lakes Report); InterAction Member Activity Report: West Africa (June 2003) (West Africa Report); InterAction Member Activity Report: Democratic Republic of the Congo (December 2000) (DRC Report); InterAction Member Activity Report: Sudan (April 2000) (Sudan Report); InterAction Member Activity Report: Indonesia (June 2003) (Indonesia Report); InterAction Member Activity Report: South Caucasus (December 2002) (South Caucasus Report); InterAction, Disaster Reponse – Efforts of Interaction Member Agencies in Chechnya and Ingushetia (September 2001) (Chechnya Report) (*reports available from* http://www.interaction.org/disaster/index.html or http://www.interaction.org/disaster/archive.html#Activity) (accessed February 20, 2004).

[7] Afghanistan Report, p. 6.

surrounding countries of Iran, Syria, Jordan, Lebanon, Turkey, and Saudi Arabia.[8] Thirty-two InterAction member organizations had active or planned operations in the West African nations of Sierra Leone, Liberia, Cote d'Ivoire, and Guinea.[9] In 2000, ten were active in Sudan.[10] Thirty-six member organizations were active in Kosovo and the surrounding areas in 2001.[11] In 1999, five had active operations in Somalia.[12]

Because humanitarian relief organizations are active in unstable areas, their presence often predates U.S. or U.S.-allied military intervention. For example, nine InterAction member organizations were active in Kosovo in 1998, prior to NATO intervention.[13] At least eight member organizations currently active in Afghanistan had operations there before the 2001 intervention by U.S.-led forces.[14] All eighteen member reports of active or planned

[8] InterAction Member Activity Report: Iraq, its Neighbors, and Lebanon (March 2003) (Iraq Report) p. 12, *available at* http://www.interaction.org/files.cgi/1148_Iraq_and_Neighbors_March_2003.pdf (accessed February 20, 2004).

[9] West Africa Report, p. 11.

[10] Sudan Report, p. 6.

[11] InterAction, Disaster Response – Efforts of Interaction Member Agencies in Kosovo (May 2001) (2001 Kosovo Report) available at http://www.interaction.org/kosovo/index.html (accessed February 20, 2004).

[12] InterAction Member Activity Report: Somalia (December 1999) (Somalia Report) p. 5, *available at* http://www.interaction.org/files.cgi/611_12-99Somalia.doc (accessed February 20, 2004).

[13] InterAction, Situation Report: Kosovo, A Guide to the Relief and Development Efforts of InterAction Member Agencies (April 1998) (1998 Kosovo Report) p. 3, *available at* http://www.interaction.org/files.cgi/606_04-98Kosovo.doc (accessed February 20, 2004).

[14] Afghanistan Report, p. 11 (Action Against Hunger USA), p. 20 (Catholic Relief Services), p. 25 (Church World Service), p. 36

(Continued on following page)

operations in Iraq in 2002 were given prior to the March 2003 U.S.-led invasion.

In order to carry out their missions with any degree of effectiveness, relief organizations must be on the ground in unstable, conflict-ridden areas. For example, Doctors Without Borders (Medicins Sans Frontieres) has delivered humanitarian aid throughout the world in armed conflicts for more than 30 years. Based on its experience, it has concluded that untargeted food drops, such as those carried out by the U.S. military at the start of its operations in Afghanistan, are rarely effective, and the key to successful delivery of services is on-the-ground intervention in the most dangerous "hotspots" around the world.[15]

Mention of only a few examples of the staffing of on-the-ground relief operations demonstrates their vast scope in troubled areas. According to recent figures on Afghanistan, CARE has 770 personnel present, 8 of them non-Afghan;[16] Action Against Hunger has 650 local staff in

(International Medical Corps), p. 38 (International Rescue Committee), p. 43 (Mercy Corps), p. 52 (Relief International), & p. 55 (Save the Children), *available at* http://www.interaction.org/files.cgi/468_Afghanistan_May_2002.pdf (accessed February 20, 2004). CARE USA has been working continuously in Afghanistan since the early 1990s. *See* Afghanistan, *at* http://www.careusa.org/careswork/countryprofiles/1.asp.

[15] Morten Rostrup, *'Humanitarian' and 'Military' don't go together,* INTERNATIONAL HERALD TRIBUNE, October 18, 2001, *available at* http://www.msf.org/content/page.cfm?articleid=F7813F57-F83B-4EA1-8BC921735D2878A0 (accessed February 20, 2004); *see also* Christopher Kremmer, *The Quality of Mercy: Food Drops in Minefields*, SYDNEY MORNING HERALD, October 10, 2001.

[16] *See* Afghanistan Special Report, *at* http://www.careusa.org/newsroom/specialreports/afghanistan/ (accessed February 20, 2004).

addition to its 34 international staff;[17] Catholic Relief Services operates three offices in Afghanistan;[18] and the International Rescue Committee operates five offices there.[19] In Iraq, Save the Children has 151 aid workers,[20] along with Mercy Corps's 30 international and 120 local staff in five offices[21] and the nearly 40 members of the International Medical Corps's staff.[22] Action Against Hunger has another 94 expatriate staff and about 1660 local staff in Sudan, Sierra Leone, Liberia, Guinea, the Democratic Republic of Congo, Angola, Somalia, Kosovo, Serbia, and Haiti.[23] Catholic Relief Services has another 932 relief workers operating in Sudan, Sierra Leone, Democratic Republic of Congo, Liberia, Guinea, Angola, Haiti, Kosovo, and Serbia, at least 19 of whom are international.[24]

Although their mission is different from that of aid workers, journalists, too, are regularly assigned to

[17] *See* Afghanistan Mission, *at* http://www.aah-usa.org/programs/afghanistan.html (accessed February 20, 2004).

[18] *See* Afghanistan, *at* http://www.catholicrelief.org/where_we_work/asia/afghanistan/index.cfm (accessed February 20, 2004).

[19] *See* The IRC in Afghanistan *at* http://www.theirc.org/Afghanistan/index.cfm (accessed February 20, 2004).

[20] *See* Iraq Crisis, *at* http://www.savethechildren.org/emergencies/iraq/index.asp (accessed February 20, 2004).

[21] *See* Iraq, *at* http://www.mercycorps.org/items/1398 (accessed February 20, 2004).

[22] *See* Iraq, *at* http://www.imcworldwide.org/programs/iraq.html (accessed February 20, 2004).

[23] *See* Where We Work, *at* http://www.aah-usa.org/programs/country_directory.html (accessed February 20, 2004).

[24] *See* http://www.catholicrelief.org/where_we_work/ (accessed February 20, 2004).

dangerous combat areas to carry out the vital mission of reporting on the military, political, and humanitarian consequences of armed conflicts in which U.S. troops are engaged.[25] With the advent of live television coverage and 24-hour news channels, the public – both in the United States and around the globe – has come to rely upon the news media and to expect that its members will report from locations at or near the front lines of combat zones.[26] Indeed, for journalists to effectively cover military conflicts, they must be "in the trenches" at or near combat zones. This often places reporters directly in harm's way as they pursue their stories.

Reflecting the vast scope of modern news reporting, it is estimated that several thousand members of the media were deployed before the coalition attack on Iraq began on March 20, 2003.[27] Over 600 correspondents were embedded

[25] Hans-Peter Gasser, *The protection of journalists in dangerous professional missions*, INTERNATIONAL REVIEW OF THE RED CROSS, February 29, 1983, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/BBE4FC40309D69C7C1256B66005C4EEE (accessed February 20, 2004).

[26] War coverage by a free press has long been recognized as vital to our democratic system. *See, e.g., McConnell v. FEC*, 124 S. Ct. 619, 722-23 (2003) (Scalia, J., concurring in part and dissenting in part) (noting the Founding generation's response to Britain's practice of taxing newspapers reporting unfavorable war coverage); *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.").

[27] Tammy L. Miracle, *The Army and Embedded Media*, MILITARY REVIEW, Sept. 1, 2003.

with the U.S. military as the war proceeded.[28] Perhaps the best illustration of journalists' proximity to the front lines is the number of reporters who have been killed while carrying out their work. In 2001, eight journalists were killed in Afghanistan after hostilities began.[29] At least fourteen journalists have been killed while reporting on the recent Iraq conflict, four by coalition fire.[30]

B. The United States Government And The United Nations Have Recognized The Vitally Important Functions That Humanitarian Relief Organizations Serve In Areas Of Armed Conflict

Both the United Nations and the United States government have carved out a key role for private humanitarian organizations in their own relief planning. The United States Agency for International Development (USAID), the agency primarily responsible for foreign assistance, recognizes the importance of relief organizations in providing humanitarian and development assistance in developing countries, and considers them "leaders

[28] *Id.*; Ellen Goodman, *War Without the 'Hell,'* BOSTON GLOBE, April 17, 2003, p. A19.

[29] Sherry Ricchiardi, *Preparing for Battle*, AMERICAN JOURNALISM REVIEW, July 1, 2002, at 38, *available at* http://www.ajr.org/article.asp?id=2566 (accessed February 23, 2004); George Gedda, *Group: 37 journalists killed in 2001, group says*, MIAMI HERALD, March 26, 2002, at 25.

[30] *See* Committee to Protect Journalists, Journalists Killed in 2003: 36 confirmed, *at* http://www.cpj.org/killed/Ten_Year_Killed/2003_list.html (accessed February 20, 2004).

in disaster relief."[31] In 2002, U.S.-based private voluntary organizations (PVOs) registered with USAID spent nearly $8 billion on overseas assistance programs.[32] The lion's share of assistance from the State Department's Office of Foreign Disaster Assistance is provided through relief and rehabilitation projects managed by non-governmental organizations and PVOs.[33] When preparing for the aftermath of the 2003 invasion of Iraq, the U.S. government planned a significant role for humanitarian relief organizations in recognition of their expertise, resources, and responsiveness.[34]

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[31] USAID, 2004 report of voluntary agencies engaged in overseas relief and development registered with the U.S. Agency for International Development (VolAg Report) p. 4, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/volag04.pdf (accessed February 20, 2004).

[32] VolAg Report p. 117. Private voluntary organizations registered with USAID are private, non-profit organizations providing voluntary charitable or development assistance abroad. VolAg Report p. 4 n. 1; USAID, Conditions for Registration for U.S. PVOs, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/cond_reg.html (accessed February 20, 2004).

[33] USAID, Bureau for Democracy, Conflict, and Humanitarian Assistance, Office of Foreign Disaster Assistance, 2002 Annual Report pp. 16-17, *available at* http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2002.pdf (accessed February 20, 2004).

[34] *See* statements of Lt. Gen. (Ret.) Jay Garner, Coalition Provisional Authority, in testimony before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003); Testimony of Richard L. Greene, Principal Deputy Assistant Secretary for Population, Refugees, and Migration, before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (*testimony available from* http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=171) (accessed February 20, 2004); and Joseph J. Collins, Deputy Assistant

(Continued on following page)

The U.N. also recognizes the importance of relief organizations and relies upon them to assist the U.N.'s own relief efforts around the globe. The General Assembly has repeatedly recognized the role of non-governmental relief organizations,[35] and has called upon U.N. agencies to strengthen their relationships with those organizations.[36]

II. The Nature Of Humanitarian Relief Work And Journalism Present A Significant Risk Of Mistaken Military Detentions

Given the conditions in which relief workers and journalists are forced to operate, they face a real risk of mistaken or ill-founded military detention. The scenario for such detentions is made all the more realistic given the principles of independence and impartiality which govern

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Secretary of Defense, in testimony before the House Subcommittee on National Security, Emerging Threats and International Relations (July 18, 2003), *available at* http://reform.house.gov/UploadedFiles/CONGRESSIONAL%20TESTIMONY_Collins_18%20July03.pdf (accessed February 20, 2004).

[35] *See, e.g.*, Resolution Adopted by the General Assembly, Fiftieth Anniversary of the Office of the United Nations High Commissioner for Refugees and World Refugee Day, A/RES/55/76, para. 4 (Dec. 4, 2000), *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/563/95/PDF/N0056395.pdf?OpenElement (accessed February 20, 2004); Resolution Adopted by the General Assembly, International Conference on Central American Refugees, A/RES/45/141, para. 15 (Dec. 14, 1990), *available at* http://www.un.org/documents/ga/res/45/a45r141.htm (accessed February 20, 2004).

[36] *See, e.g.*, Resolution Adopted by the General Assembly, Office of the United Nations High Commissioner for Refugees, A/RES/54/146, para. 13 (Dec. 17, 1999), *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/294/94/PDF/N0029494.pdf?OpenElement (accessed February 20, 2004).

the activities of humanitarian workers, the practical necessity of forging ties with local communities, and the fog of war and unreliable communications between the military, relief organization, and journalists.

A. Impartiality, Independence, And Ties To Local Communities Enhance The Risk Of Mistaken Detention Of Relief Workers And Journalists

The principles of impartiality and independence in the provision of aid are universally-recognized tenets of the humanitarian mission.[37] Impartiality requires relief workers to provide aid to those in need, without regard to the personal or political characteristics of the aid recipients or whether the provision of aid is counter to U.S. political or military goals.[38] Similarly, independence dictates that relief workers cannot act to further governmental political or military agendas, or be perceived as instruments of foreign policy.[39]

[37] Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, *in* The Project SPHERE Handbook, Oxfam, Oxford (2000), pp. 315-324 (Code of Conduct), *available at* http://www.sphereproject.org/handbook/hdbkpdf/hdbk_full.pdf (accessed February 20, 2004). The Code is followed by 281 signatories as of January 2004. *See* Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief: List of Signatories, *available at* http://www.ifrc.org/docs/pubs/disasters/codeconduct_signatories.pdf (accessed February 20, 2004). Principles 2, 3, and 4 are based on the principle of impartiality and independence.

[38] Code of Conduct, Principles 2 & 3.

[39] Code of Conduct, Principle 4.

Humanitarian workers adhere to the principles of impartiality and independence as indispensable requirements for the effective delivery of relief services. Further, both humanitarian workers and journalists must adhere to these principles for their own security in unstable areas. The principles recognize that if local communities perceive aid workers as associated with U.S. military or American political agendas, those communities may not offer the trust necessary for the effective delivery of assistance. As has been recently documented in Congressional hearings, military intervention into the delivery of humanitarian assistance impairs the perception of humanitarian groups as impartial actors and can give relief work the appearance of political or military acts.[40] Simply put, aid workers

[40] *See* testimony of Curtis Welling, AmeriCares, to the U.S. House Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, Topic: Humanitarian Assistance Following Military Operations: Overcoming Barriers (May 13, 2003) (Welling Testimony); Congressional testimony of Kevin Henry, Advocacy Director, CARE USA, before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (Henry Testimony); George C. Biddle, Statement for the Record, House Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (Biddle Statement) (*testimony available from* http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=171) (accessed February 20, 2004); testimony of Tammie Wilcutts, Save the Children, before the House Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform: "Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II" (July 18, 2003) (Willcuts Testimony); Statement of Serge Duss, Director of Public Policy and Advocacy, World Vision, On Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II before the Subcommittee on National Security, Emerging Threats and International Relations, U.S. House of Representatives (July 18, 2003) (Duss Statement) (*testimony available*

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can be denied access to the people they are trying to assist if their actions are viewed as partisan.[41]

Independence is critical not only for the effective delivery of relief services, but also to the safety of relief workers and journalists. NGOs that operated in Somalia and the Balkans are still paying the price, a decade later, for the confusion between military and humanitarian objectives created when U.S. troops were present among the refugee camps.[42] A common protest from humanitarian organizations operating in Afghanistan and Iraq is that U.S. efforts to associate military action with the provision of humanitarian aid creates a grave threat to the safety of relief workers.[43] Thus, humanitarian groups must take steps to insure they are independent of the U.S. military

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from http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=302) (accessed February 20, 2004).

[41] Morten Rostrup, *'Humanitarian' and 'Military' don't go together,* INTERNATIONAL HERALD TRIBUNE, October 18, 2001, *available at* http://www.msf.org/content/page.cfm?articleid=F7813F57-F83B-4EA1-8BC921735D2878A0 (accessed February 20, 2004).

[42] *Id.*; Nathan Ford, *Afghanistan – humanitarian aid and military intervention don't mix,* BRITISH JOURNAL OF GENERAL PRACTICE, November 2001, *available at* http://www.msf.org/countries/page.cfm?articleid=6A534F6C-233B-46AE-83BBEF2580A86AD4 (accessed February 20, 2004).

[43] Welling Testimony; Henry Testimony; Biddle Statement; Willcuts Testimony; Duss Statement; Congressional testimony of Patrick Carey, Senior Vice President/Program, CARE USA, before the Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations: Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II (July 18, 2003) (Carey Testimony), *available at* http://reform.house.gov/UploadedFiles/IRAQ%20CONGRESSIONAL%20TESTIMONY%20(July%202003).pdf (accessed February 20, 2004).

and that this independence is recognized by those they are trying to help.

As journalists and relief organizations are increasingly at risk of attack by combatants, strict adherence to the principles of impartiality and independence become ever more critical, heightening the risk that soldiers in combat zones will misperceive the independence of a relief worker or journalist as hostility. In response to heightened security risks, relief workers and journalists sometimes consider the use of private security forces, aggravating the risk of being misperceived as belligerents by U.S. forces.[44] Although the practice is debated in the relief community on both moral and security grounds,[45] armed guards are sometimes hired for protection in particularly dangerous situations, heightening the risk that journalists and aid

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[44] Charles Rogers, "The Changing Shape of Security for NGO Field Workers," Together Magazine (Jan.-March 1998), *available at* http://www.worldvision.org/worldvision/pr.nsf/stable/NGOsecurity (accessed February 20, 2004).

[45] The International Committee for the Red Cross, for example, has promulgated standards governing the decision to use armed security. *See* International Committee of the Red Cross, Council of Delegates, Resolution 9 "Armed Protection of Humanitarian Assistance" [Geneva, 1995] CRC, No. 310, Jan.-Feb. 1996, pp. 150-51, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FFFCE35F97695373C1256B6600597FCB (accessed February 20, 2004); Report on the Use of Armed Protection for Humanitarian Assistance (Extract from Working Paper Submitted Jointly by the International Federation and the ICRC at the Council of delegates, Geneva, 1-2 December 1995, 95/CD/12/1), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/209B1D50B7089A49C1256B66005A58D3 (accessed February 20, 2004). Some relief organizations, including CARE, discourage the practice under any circumstances.

workers may be mistaken for enemy supporters or misidentified as enemy combatants.[46]

Journalists, too, sometimes find it useful not to be distinguished from local populations. For instance, at the outset of the conflict in Afghanistan, journalists crowded into Tajikistan hoping to buy a $300 helicopter ride into the rebel-held sectors of northern Afghanistan. Some sneaked into Taliban territory dressed from head to toe like women in traditional burkhas.[47] In Afghanistan, one journalist disdained hiring an SUV driver, as is the typical custom, and preferred traveling with a low profile around the countryside in unmarked taxis. In doing so, the reporter gained some anonymity but risked raising suspicions if stopped by local warlords or U.S. troops.[48]

[46] Committee to Protect Journalists, On Assignment: Covering Conflicts Safely, *at* http://www.cpj.org/Briefings/2003/safety/safety.html (accessed February 16, 2004); Phillipe Dind, Security in ICRC field operations in "Secure 02" (June 2002), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FFF830A9E30C059AC1256B66005C0B1C (accessed February 20, 2004).

[47] Neil Hickey, *The Pentagon's War Reporting Rules are the Toughest Ever,* COLUMBIA JOURNALISM REVIEW, Issue 1: January/February 2002, *available at* http://www.cjr.org/issues/2002/1/afghan-hickey.asp (accessed February 20, 2004).

[48] Committee to Protect Journalists, On Assignment: A Guide to Reporting in Dangerous Situations, *at* http://www.cpj.org/Briefings/2003/ safety/journo_safe_guide.pdf (accessed February 20, 2004).

B. The Fog of War and Poor Communications Between the Military, Relief Organizations and Journalists Heighten The Risk Of Mistaken Identification Of Aid Workers And Journalists As Enemy Combatants

Under the circumstances in which relief organizations and journalists work, it is all too easy for the military to mistake a neutral party for an enemy. Such errors can occur in the fog of war, and the conditions that give rise to them are exacerbated by poor communication between the military, on one hand, and journalists and relief workers, on the other. Even when journalists and relief workers follow the military into an area of conflict in coordination with military planners, communication often breaks down.[49] Communication is less reliable when relief workers and journalists are present before military operations commence or when they act independently of military planners. Furthermore, confusion and poor coordination may prevent a relief or news organization from discovering that field personnel have been mistakenly detained.

Several fatal incidents in Iraq demonstrate the difficult military judgments military forces must make in the heat of battle. On August 17, 2003, U.S. forces operating near Baghdad shot and killed a Reuters television cameraman, Mazen Dana. According to the military, a soldier mistook Dana's camera for a rocket-propelled grenade.[50] After an investigation, the military concluded

[49] *See* Welling Testimony; Henry Testimony; Carey Testimony.

[50] Joel Campagna, *A U.S. Silence in Iraq Puts a Deadly Cloud Over Journalists,* L.A. TIMES, Aug. 27, 2003, p. B13, *available at* http://www.cpj.org/op_ed/Campagna27aug03.html (accessed February 20, 2004);

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the soldiers acted within the rules of engagement.[51] In a similarly unfortunate episode, two Reuters cameramen were killed in Iraq when U.S. troops fired upon the hotel where they were staying. The military claimed the troops were fired upon from the Palestine Hotel before they returned fire. Some reports said that the troops fired on the hotel when they saw a person with binoculars in a hotel window, leading the military to believe the individual was serving as an artillery spotter for Iraqi fighters.[52]

If it is hard to tell a camera from a grenade launcher, it is easy to imagine the difficulties military officials face trying to distinguish between true enemy combatants and those individuals who are simply in war zones performing their jobs. As demonstrated by numerous examples, over the last two years the U.S. military has frequently mistaken neutral parties for enemy combatants and detained them for various periods.

In January 2004, the U.S. military arrested three journalists outside of Baghdad. Two worked for Reuters and one for NBC. The journalists were detained for three days, and were allegedly treated poorly and deprived of sleep before being released,[53] The military claimed it had

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Mona Eltahawy, *A Needless Death in the Light of Day,* WASHINGTON POST, Aug. 23, 2003, p. A23.

[51] AP, *Military: Shooters Followed the Rules,* FT. LAUDERDALE SUN-SENTINEL, Sept. 23, 2003, p. 10A.

[52] Joel Campagna and Rhonda Roumani, *Permission to Fire: CPJ Investigates the Attack on the Palestine Hotel,* May 27, 2003, *at* http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_hotel.html (accessed February 20, 2004).

[53] *See* Luke Harding, *US military 'brutalised' journalists,* THE GUARDIAN, Jan. 13, 2004, *available at* http://www.guardian.co.uk/

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detained "enemy personnel posing as media," guerillas who wore bulletproof jackets marked "press" and fired on U.S. forces. International media organizations have called on the Pentagon to publicly acknowledge that the Reuters and NBC journalists detained were not "enemy personnel posing as media."[54]

In July 2003, U.S. forces in Iraq detained Said Abu Taleb and Soheil Kareemi, two journalists with Iranian State Television, after they were seen filming near a U.S. military outpost. A coalition spokesman was quoted as saying that the journalists were detained for committing security violations and that they were "not acting in a journalistic capacity when they were arrested." They were released without charges some four months later, in November, and allowed to return to Iran.[55]

Even more troubling is the case of Sami al-Haj, a Sudanese cameraman working for the pan-Arab television station, al-Jazeera. On December 15, 2001, al-Haj was arrested by Pakistani police on the Pakistan-Afghanistan border. He had worked at the station since October 2001

Iraq/Story/0,2763,1121981,00.html (accessed February 20, 2004); Letter from Ann Cooper, Executive Director, Committee to Protect Journalists, to Lt. Gen. Ricardo S. Sanchez, Commander, Coalition Joint Task Force 7 (January 21, 2004), *available at* http://www.cpj.org/protests/04ltrs/Iraq21jan04pl.html (accessed February 20, 2004).

[54] Ann Cooper, *Journalists in Iraq: from 'embeds' to targets,* SEATTLE TIMES, February 9, 2004, *available at* http://www.cpj.org/op_ed/Cooper09feb04.html (accessed February 20, 2004).

[55] Agence France-Presse, *Two Iranian state TV journalists briefly held after Baghdad bombing,* January 19, 2004, *available at* http://www.smh.com.au/articles/2004/01/18/1074360639457.html (accessed February 20, 2004).

and had been sent to Pakistan to cover the U.S. military operation in Afghanistan. Following his arrest, al-Jazeera had no news of him until April 2002, when al-Haj's wife received a letter through the International Red Cross saying he was being held at the U.S. Naval base at Guantanamo Bay. The station has been unable to find out why he is being held or whether he has been charged.[56]

III. Due Process and the Geneva Convention Provide Mechanisms to Avoid Indefinite Mistaken Detentions

In light of the serious risk of mistaken military detention facing journalists and humanitarian relief workers, military detainees should be afforded some form of meaningful due process to test the accuracy of their classification as enemy combatants. Meaningful due process review would help ensure that mistakes are rectified, allow *amici* and their members to discharge their responsibilities free from the chilling effect that is created by the Fourth Circuit's rule, and potentially deter the military from arbitrary or groundless detentions. *Amici* recognize that the requirements of due process vary depending on the context, *see Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), and in this case *amici* take no position as to the specific procedural protections that

[56] *See* Freelance Reporters: United States – 2003 Annual Report, *at* http://www.rsf.fr/article.php3?id_article=6228 (accessed February 20, 2004); Letter from Ann Cooper, Executive Director, Committee to Protect Journalists, to The Honorable Donald H. Rumsfeld, Secretary of Defense (September 27, 2002), *available at* http://www.cpj.org/inquiry/2002/USA27sept02inq.html (accessed February 20, 2004).

should be afforded to Petitioner either through the civil courts or under the Geneva Convention. But under the Fourth Circuit panel's approach, Petitioner was afforded no real process at all, based solely on the panel's inference that he was captured in a zone of combat. That criterion applies equally to thousands of journalists and relief workers, and is far from being sufficiently probative of anyone's status as a belligerent to justify indefinite, unreviewable detention by the Executive Branch.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

STEVEN M. PESNER, P.C.
Counsel of Record

JAMES J. BENJAMIN, JR.
MICHAEL SMALL
JEFFREY P. KEHNE
NATASHA G. KOHNE

AKIN GUMP STRAUSS HAUER & FELD, LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Counsel for Amici Curiae International Humanitarian Organizations and Associations of International Journalists

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IN THE

Supreme Court of the United States

YASER ESAM HAMDI and ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD and W.R. PAULETTE, Commander,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE HON. NATHANIEL R. JONES, HON. ABNER J. MIKVA, HON. WILLIAM A. NORRIS, HON. H. LEE SAROKIN, HON. HERBERT J. STERN, HON. HAROLD R. TYLER, JR., SCOTT GREATHEAD, ROBERT M. PENNOYER, AND BARBARA PAUL ROBINSON IN SUPPORT OF PETITIONERS

DEBORAH PEARLSTEIN
THE LAWYERS COMMITTEE
FOR HUMAN RIGHTS*
333 Seventh Avenue
13th Floor
New York, NY 10001-5004
(212) 845-5200
* *Now known as*
Human Rights First

ROBERT P. LOBUE
Counsel of Record
ALEXIS GANDER
ADEEL A. MANGI
CLARE F. SAPERSTEIN
CARRIE A. SYME
PATTERSON, BELKNAP, WEBB
& TYLER LLP
1133 Avenue of Americas
New York, NY 10036
(212) 336-2000

Counsel for Amici Curiae

185862

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Amici intend to address the third question presented in the petition for certiorari:

> Whether the separation of powers doctrine precludes a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification for its indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant"?

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INTRODUCTION

Yaser Hamdi's father claims his son was a civilian relief worker. The executive claims he was an enemy combatant. The decision of the U.S. Court of Appeals for the Fourth Circuit holds that federal courts have no role to play in determining who is correct, and consigns an American citizen to indefinite detention without charges or trial. That decision misapplies the separation-of-powers doctrine and abdicates the courts' historic role in habeas corpus cases to inquire into the factual basis for executive detention. This Court should therefore reverse the dismissal of the habeas corpus petition and direct that the district court "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243 (2000).[1]

STATEMENT OF INTEREST OF AMICI

Amici, the former federal judges and attorneys listed below who have devoted their careers to promoting the rule of law as implemented in our nation's courts, have an abiding interest in the independence of the judiciary as a check on the actions of the executive branch.

Judge Nathaniel R. Jones served as a judge on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002.

Judge Abner J. Mikva served as a judge on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge from 1991 to 1994. He also served as White House Counsel from 1994 to 1995. Prior to taking the bench, he served five terms as a member of Congress.

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1. This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk. No counsel for the parties has authored this brief in whole or in part. No person other than amici and their counsel has made a monetary contribution to the preparation or submission of this brief.

Judge William A. Norris served as a judge on the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

Judge H. Lee Sarokin served as a judge on the United States District Court for the District of New Jersey from 1979 to 1994, and on the United States Court of Appeals for the Third Circuit from 1994 to 1996.

Judge Herbert J. Stern served as a judge on the United States District Court for the District of New Jersey from 1973 to 1987. He also served as the United States Judge for Berlin from 1979 to 1980.

Judge Harold R. Tyler, Jr. served as a judge on the United States District Court for the Southern District of New York from 1962 to 1975. He has also served as the Deputy Attorney General of the United States, an Assistant Attorney General of the United States Department of Justice Civil Rights Division, and an Assistant United States Attorney.

Scott Greathead is a member of the New York bar and an international human rights advocate. He has traveled to more than a dozen countries to advocate the rights of persons under executive detention.

Robert M. Pennoyer is an attorney in private practice in New York City. He has served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, the Assistant to the General Counsel of the Department of Defense, and the Special Assistant to the Assistant Secretary of Defense for International Security Affairs.

Barbara Paul Robinson is an attorney in private practice in New York City. She is a former President of the Association of the Bar of the City of New York.

STATEMENT OF THE CASE

As the case comes to this Court, the facts that the panel below considered to be dispositive are either not supported by evidence or very much in dispute. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 360-61 (4th Cir. 2003) (hereinafter *Hamdi IV*) (Luttig, J., dissenting from denial of rehearing en banc). For example, while the decision here on review embraces as dispositive that Mr. Hamdi was "captured on the battlefield," *Hamdi v. Rumsfeld*, 316 F.3d 450, 468, 471 (4th Cir. 2003) (hereinafter *Hamdi III*), neither the petition for habeas corpus, the Mobbs Declaration, nor anything else in the record, sets forth where Mr. Hamdi was apprehended. The Mobbs Declaration alleges that Mr. Hamdi was not captured by United States forces, but was handed over to the U.S. military in Afghanistan by unnamed members of the Northern Alliance. J.A. at 149 (Mobbs Decl. ¶¶ 4, 7). How and where the Northern Alliance apprehended Mr. Hamdi are not disclosed. Further, while the Mobbs Declaration asserts that Mr. Hamdi "was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control," no information is provided as to what those criteria are or the facts to which those criteria were applied in Mr. Hamdi's case. *Id.* (Mobbs Decl. ¶ 7).

Mr. Mobbs asserts that all "individuals associated with al Qaeda or Taliban were and continue to be enemy combatants," *id.* (Mobbs Decl. ¶ 6), and that Mr. Hamdi was "affiliated with a Taliban military unit," *id.* at 148 (Mobbs Decl. ¶ 3), but does not explain what the words "associated" and "affiliated" mean in this context. Although the Government asserts to this Court that the President has "conclusively determined" that Mr. Hamdi is an "unlawful combatant" (Opp. to Cert Pet. at 29), the Mobbs Declaration does not use the term "unlawful combatant," and only asserts that the U.S. military has determined that Mr. Hamdi is an "enemy combatant." J.A. at 149 (Mobbs Decl. ¶¶ 6, 7). No facts were presented to the habeas court to establish that the

petitioner has committed offenses under any criminal or military code. There is no suggestion that Mr. Hamdi has any connection with al Qaeda or has committed acts of terrorism.

For all that appears in the record, Mr. Hamdi might be (1) a lawful combatant entitled to all the protections afforded such a person by the Geneva Convention,[2] which the Government concededly has not granted him; (2) an "unlawful" combatant based on some as yet undisclosed evidence as applied to some as yet undisclosed standard of conduct; (3) a civilian in the wrong place at the wrong time.[3]

In the face of these uncertainties, the decision below holds that "any effort [by the courts] to ascertain the facts" would invade the executive's "war efforts." *Hamdi III*, 316 F.3d at 474-75. Instead, the only permissible judicial inquiry is whether the facts alleged by the Government in support of the prisoner's detention would, "*if accurate*," provide a valid basis for the detention. *Id.* at 473 (emphasis added). The court below therefore accorded conclusive effect to the two-page hearsay Mobbs Declaration that purported to set forth the facts pertaining to Mr. Hamdi's apprehension and detention. The habeas petition was dismissed without a hearing, without any judicial inquiry into the veracity of the allegations by the Government, and without the petitioner having been informed of the factual allegations on which he has been held or afforded access to his court-appointed counsel to apprise counsel whether the facts alleged in the Mobbs Declaration are true.[4]

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2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter "Geneva Convention").

3. The assertion that Mr. Hamdi was a civilian relief worker is noted at *Hamdi IV*, 337 F.3d at 346 n.3 (Traxler, J., concurring in denial of rehearing en banc).

4. The Mobbs Declaration implies that the declarant or others within the U.S. military have in their possession evidence, such as (Cont'd)

The Fourth Circuit's ruling has placed Mr. Hamdi in a legal limbo. He has not been charged with any crime in either the civilian or military justice systems and the Government disclaims any obligation to so charge him at any time. (Opp. to Cert. Pet. at 24.) Mr. Hamdi has not been accorded prisoner-of-war status and has not been afforded the protections of the Geneva Convention, including the right to have a "competent tribunal" determine his status.[5] The Government disclaims any obligation to invoke such a hearing because petitioner's status is, at least in the military's mind, "not in doubt" (*id.* at 29) and has refused the district court's suggestion that it conduct a hearing before a military tribunal to confirm Mr. Hamdi's status (*see* Pet. for Cert. at 9 n.7). Even if the Government were to acknowledge an obligation to release him (or to charge him for war crimes) when hostilities end,[6] given the nature of the present conflict, hostilities may continue indefinitely. In short, if the Government's position were accepted, Mr. Hamdi, and anyone similarly situated, could be detained for life without hope of access to any forum – civilian

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(Cont'd)
statements of Mr. Hamdi and others, that supports their assertions as to Mr. Hamdi's status, and there is no claim of inability to marshal that evidence. *See* J.A. at 149-50 (Mobbs Decl. ¶¶ 5, 8, 9). The fact-gathering difficulties hypothesized by the Fourth Circuit, *Hamdi III*, 316 F.3d at 473-74, appear to be absent.

5. Geneva Convention, art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

6. Geneva Convention, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Geneva Convention, art. 119 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment.").

or military – with authority to inquire into the factual basis of his detention.

The panel below countenanced that result despite its recognition that "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." *Hamdi III*, 316 F.3d at 473. Indeed, reports of bounty hunting by Northern Alliance members cast in doubt the alleged circumstances of any prisoner handed over to the U.S. authorities by the Northern Alliance.[7] The United States to date has released some 87 Guantanamo detainees,[8] several of whom have asserted that they were mistakenly identified as enemy combatants.[9] In addition, in the wake of the September 11 attacks, there have been other instances in which persons wrongly have been accused of terrorist associations or activities.[10] Those reports

7. *See* Indira A.R. Lakshmanan, *Freed Detainees Cite Rewards, Beatings Ex-Prisoners Talk of Treatment at Guantanamo Bay*, The Boston Globe, March 26, 2003, at A6 (reporting that a released detainee "said he was forcibly conscripted by the militia and captured by a notorious warlord, General Abdul Rashid Dostum, who 'sold us to the U.S.'"); *see also* Carlotta Gall, *A Nation at War: Kabul; U.S. Sends 18 at Guantanamo to Afghanistan to be Freed*, The New York Times, March 25, 2003, at B13.

8. *See World in Brief*, The Washington Post, February 15, 2004, at A25.

9. The first four detainees released in October 2002 included a 71-year-old man who was captured while traveling to visit a doctor and who claimed he never fought for the Taliban; in fact, he was from a village that fought against the Taliban. Liz Sly, "*I didn't do anything wrong,*" *aged former detainee says*, Chicago Tribune, October 30, 2002, at N3. One of the juveniles released on January 29, 2004, has stated that he was arrested by Afghan militia soldiers and turned over to the Americans while he was simply looking for work. Carlotta Gall, *Freed Afghan, 15, Recalls a Year at Guantanamo*, The New York Times, February 11, 2004, at A3.

10. One well-publicized casualty of the "war on terror" is Abdallah Higazy, an Egyptian national who was falsely accused of possessing an

(Cont'd)

underscore the inevitability of some error in the factual determinations that underlie detention decisions, even by agents acting in complete good faith, that proper judicial review may correct. They also remind us, however, that habeas corpus is the ultimate protection of the people against executive officers *not* acting in good faith, who can misuse their awesome powers to deprive innocent persons of liberty for illegitimate reasons.

SUMMARY OF ARGUMENT

The Fourth Circuit decision misapplies the separation-of-powers doctrine by elevating to a preferred position the executive's military prerogatives, while surrendering a core attribute of judicial power: the power to find the facts that are determinative of a specific dispute before the court. This Court has refused to give effect even to congressional enactments that purported to eliminate the federal courts' ability to decide dispositive factual disputes in specific cases properly before them. Here, where congressional enactments have instructed the courts to "determine the facts" presented in habeas petitions, 28 U.S.C. § 2243, and authorized them to reject the executive's factual representations, 28 U.S.C. § 2248, executive power to demand a different procedure is at its weakest.

This Court has repeatedly indicated that the judicial power does not disappear in times of war. There is no reason to believe that federal courts would unduly interfere with military operations or compromise national security by performing a role in which the courts are expert – resolving factual disputes – and

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aviation radio on September 11, 2001 at a hotel near the World Trade Center, arrested by the FBI as a material witness, and held in solitary confinement for 31 days before being released. A United States District Judge later stated that "[t]he court . . . was apparently seriously misled on two occasions in connection with the detention of Mr. Higazy as a material witness. . . ." *See* Christine Haughney, *Judge Orders Inquiry Into Detainment of Egyptian*, The Washington Post, August 17, 2002, at A02.

numerous cases involving substantial national security concerns have been successfully processed by the courts. The Fourth Circuit's mistrust of the courts' ability to do so should be rejected.

The history and purpose of the writ of habeas corpus are also contrary to the decision below. The power to question facts alleged by the executive as support for a petitioner's detention, particularly when there have been no prior judicial or quasi-judicial findings, is essential if the writ is to fulfill its purpose as a bulwark against unlawful executive detention. To hold, as the court below did, that the habeas court is powerless to look behind the government's representations of fact would have the same effect as suspending the writ, which can properly be done only by Congress.

ARGUMENT

THE DECISION BELOW MISAPPLIES SEPARATION-OF-POWERS DOCTRINE AND UNDERMINES THE HISTORIC FUNCTION OF HABEAS CORPUS AS A CHECK ON EXECUTIVE OVERREACHING

A. The Decision Below Violates the Separation of Powers by Intruding on the Article III Judicial Power

The Fourth Circuit decision acknowledges that the separation of powers is a means of protecting the liberty of the people. *Hamdi III*, 316 F.3d at 462-63. From that unassailable premise, however, the decision quickly goes astray in recognizing and elevating to a preferred position a "right of the people" collectively to enjoy the benefits of an executive power immunized from "trespass" by the judicial branch. *Id.* at 463. The three branches of government are separate, but co-equal. The people have as much right to collectively enjoy the benefits of an independent judiciary as they do to enjoy the benefits of a wise legislature and an effective executive. In short, the principle of separation of powers does not immunize executive actions

from judicial scrutiny. The decision below, far from protecting the executive from unwarranted "trespass" by the judiciary, violates the separation of powers by causing an unwarranted surrender of the judicial power in Article III of the Constitution.

Article III creates a federal judiciary that "stand[s] independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remain[s] impartial." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). An essential element of the federal judiciary's responsibility and power under Article III is the "judicial duty to exercise an independent judgment." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936). Neither Congress nor the executive branch may constitutionally prevent the judiciary from fulfilling that duty, for both lack the authority to require "the federal courts to exercise '[t]he judicial Power of the United States,' U.S. Const., art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995) (holding that Congress violated the separation of powers by retroactively commanding the federal courts to reopen final judgments).

Throughout its history, often in cases other than habeas corpus, this Court has carefully guarded the judiciary's power to make independent judgments by reserving to Article III courts the power to determine whether the evidence is sufficient to support a specific claim properly before the court. And properly so, because "[h]ow the facts are found will often dictate the decision of federal claims." *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 416-17 (1964).[11]

11. The Court has held that under the "demands of due process and the constraints of Art[icle] III," a federal district court cannot constitutionally abdicate its duty to find facts, and can only defer to a record developed by a non-Article III officer when "the entire process (Cont'd)

The principle that a coordinate branch cannot tell an Article III court how to determine the outcome of a specific cause properly before it is central to the separation of powers envisioned in the Constitution. The paradigm is *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where the Court held unconstitutional a congressional enactment that required federal courts to find a former Confederate citizen's acceptance of a general presidential pardon to be conclusive evidence of prior disloyalty to the Union. The statute effectively determined the outcome of claims brought by those citizens under an act that allowed those who could prove their loyalty to recover property confiscated by federal troops during the war. The Court rejected this statute as an attempt by Congress to "forbid[the court] to give the effect to evidence which, in its own judgment, such evidence should have," and held it to be an unconstitutional violation of the separation of powers. *Id.* at 147 (stating that Congress "inadvertently passed the limit which separates the legislative from the judicial power"). Since *Klein*, the Court has continued to hold that Congress cannot "require federal courts to exercise the judicial power in a manner that Article III forbids" by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." *Plaut*, 514 U.S. at 218.

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), is a recent example of this Court's skepticism of attempts to compel Article III courts to rubber-stamp factual determinations of the executive branch. The question was whether the Attorney General's statutorily-authorized certification that a federal

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takes place under the district court's total control and jurisdiction." *United States v. Raddatz*, 447 U.S. 667, 681, 683-84 (1980) (holding constitutional the provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (2000), that permits a federal judge to determine and decide a motion to suppress evidence based on the record developed before a magistrate judge, because "the magistrate acts subsidiary to and only in aid of the district court").

employee was acting within the scope of his employment, which would be determinative of a tort claim against the government, was conclusive on the court. *Id.* at 420. This Court observed that the notion that Congress could "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate," *id.* at 430, is contrary to the "traditional understandings and basic principles . . . [that] executive determinations generally are subject to judicial review and . . . mechanical judgments are not the kind federal courts are set up to render." *Id.* at 434. In a case with stakes far lower than the indefinite loss of personal liberty here, the Court therefore refused to read the statute as requiring the judiciary to be bound by the Attorney General's certification, because such a reading "would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Id.* at 426.

In cases such as *Klein* and *Gutierrez de Martinez*, the Court has preserved inviolate the power of the federal courts to engage in independent fact-finding in the face of assertions that Congress had shifted the power to adjudicate facts out of the courts' control. If in the present case Congress had enacted legislation that directed the federal habeas court to accept as conclusive a declaration by a member of the Department of Defense certifying the enemy combatant status of the detainee, the attempted dilution of the courts' adjudicatory power by the legislature would present a serious constitutional issue. In the present case, however, Congress has not so legislated. Nor has it remained silent. Were the federal habeas court to accept as conclusive an executive representation of the facts that purport to justify the petitioner's confinement, as the Fourth Circuit has instructed it to do, it would disobey congressional enactments that place the fact-finding power in the habeas court.

In the Judicial Code, Congress has directed courts to "summarily hear and determine the facts" involved in a habeas petition. 28 U.S.C. § 2243. The petitioner may deny the facts of the government's return or allege facts on his own. *Id.* The Court may glean the facts from depositions, affidavits, or oral testimony, but when affidavits of the government are accepted, as in the present case, the petitioner has the right to propound written interrogatories on the government's affiant. 28 U.S.C. § 2246 (2000). Finally, even if the petitioner does not traverse the facts alleged in the return, the court may refuse to accept the facts asserted by the government if it "finds from the evidence that they are not true." 28 U.S.C. § 2248. Nothing in these enactments carves out cases involving terrorism, warfare, or other aspects of national security for different treatment.

The decision below ignores the significance of these provisions in the separation-of-powers analysis. The executive's claim here of a constitutional right to displace the fact-finding prerogatives of the habeas court misunderstands separation-of-powers principles as surely as did the executive's claim that was rejected in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Among the fundamental teachings of *Youngstown* is that the executive's assertion of power deriving from the President's role as Commander-in-Chief is at its weakest when it is opposed, not supported, by act of Congress. *Id.* at 587; *see also id.* at 646 (Jackson, J., concurring). Or, as Justice Clark's concurrence put it, such an exercise of purported executive power cannot be sustained where "Congress had prescribed methods to be followed by the President in meeting the emergency at hand," but the executive utilizes other methods of its own devising. *Id.* at 662. Here, too, the executive claims power to intrude upon the adjudicatory function of the habeas court in derogation of explicit statutory commands that repose the fact-finding function in the court itself.

B. The Power Of Judicial Review Does Not Disappear In Times Of War

The Fourth Circuit diminished the scope of judicial review to the vanishing point because the nation is at war, and because "the President is given the war power." *Hamdi III*, 316 F.3d at 471. Of course, it is not completely true that the President is given the "war power," a phrase that is not used in the Constitution. Governmental powers pertaining to the declaring and making of war are apportioned carefully among the legislative and executive branches.[12] And, here the executive power is asserted without legislative authorization to restrict the scope of habeas corpus review.

This Court has repeatedly held that the judicial power does not disappear when the nation is at war or military prerogatives of the executive are exercised. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. 115 (1851) (military officers' seizure of U.S. citizen's

12. The Constitution's only reference to the Executive's "war power" is found in Article II, section 2, clause 1, which declares the Executive to be "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." In contrast, the Constitution grants Congress a wide variety of powers governing the nation's ability to make war. *See* U.S. Const., art. I, § 8, cl. 1 (granting Congress the power to "collect taxes . . . to . . . provide for the common defense . . . of the United States"); U.S. Const., art. I, § 8, cl. 10 (granting Congress the power to "define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations"); U.S. Const., art. I, § 8, cl. 11 (granting Congress the power to "declare war" and to "make Rules concerning Captures on Land and Water"); U.S. Const., art. I, § 8, cl. 12 (granting Congress the power to "raise and support Armies"); U.S. Const., art. I, § 8, cl. 13 (granting Congress the power to "provide and maintain a Navy"); U.S. Const., art. I, § 8, cl. 14 (granting Congress the power to "make Rules for the Government and Regulation of the land and naval Forces"); U.S. Const., art. I, § 8, cl. 16 (granting Congress the power to "provide for the organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States").

property in foreign country was subject to court challenge, including jury determination of the facts); *see also*, *e.g.*, *Youngstown*, 343 U.S. at 587 ("It is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."); *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946) (describing the "philosophy embodied in the Petition of Right and Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power"); *Crowell v. Benson*, 285 U.S. 22, 58 (1932) ("When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined de novo upon habeas corpus."); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

The executive's supposed primacy in "war making" therefore does not support the surrender of the judicial power wrought by the decision below.[13] Nor does the Fourth Circuit's reliance on the alleged (but unproved) fact that Mr. Hamdi was seized in a "war zone" justify his continued detention without

13. None of the cases relied on by the Government, or by the Fourth Circuit, supports the contention that because this nation is at war a federal habeas court may be bound by the executive's assertion of the jurisdictional facts underlying its authority to detain the petitioner. In particular, in both *Ex parte Quirin*, 317 U.S. 1, 20, 38 (1942), and *In re Territo*, 156 F.2d 142, 145-46 (9th Cir. 1946), petitioners did not dispute the factual findings underpinning the determination of their status. Nonetheless, they had full access to a tribunal in which any disputed facts could be tried. Indeed, in *Quirin*, this Court reached the merits of the habeas petitions despite a presidential order that purported to deny the petitioners access to the U.S. courts. 317 U.S. at 23. In *Territo*, the district court held a hearing on the habeas petition and made the factual findings necessary to confirm that petitioner was properly designated a prisoner of war. *Id.* at 143.

effective judicial review.[14] If the place of the petitioner's capture *were* determinative, all the more reason that this vital jurisdictional fact be subjected to court review. The notion that the scope of court review of a habeas corpus petition should depend upon whether the petitioner was captured on a battlefield is, in any event, fundamentally wrong. The place and circumstances of the petitioner's capture may be relevant to the determination whether he was properly seized, and to his classification as a prisoner of war, unlawful combatant, or otherwise. But the place where the petitioner was captured bears no logical relationship to a federal district court's competence to adjudicate his habeas corpus petition.

Far from being diminished due to alleged military necessity, a habeas court's fact-finding power should be at its strongest in a case such as this, where an important liberty interest is at stake and the petitioner had no opportunity to contribute to the factual record upon which the executive based its determination. Habeas is not being used here as a post-conviction remedy to relitigate facts found adversely to the petitioner by any tribunal. This Court's willingness to permit Article III courts to defer, in some situations other than habeas, to an executive agency's factual determinations has been limited to situations where the agency made the determinations "in a judicial capacity," resolving "disputed issues of fact properly before it which the parties . . . had an adequate opportunity to litigate." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *see also St. Joseph Stock Yards Co.*, 298 U.S. at 52-53 (acknowledging that the "judicial duty to exercise an independent judgment does not require or justify disregard of

14. In addressing only Question 3 presented to this Court, amici take no position as to whether capture in a war zone is a sufficient basis for executive detention. The contention here is that, assuming those, or some other set of defined, circumstances would permit detention consistent with the Constitution, the connection with military activity does not require the courts to cede their power to verify whether in a particular case the requisite circumstances were present.

the weight which may properly attach to findings *upon hearing and evidence*") (emphasis added). If the Government had criminally prosecuted petitioner in a civilian or military court[15] or granted him an "Article 5" hearing under the Geneva Convention to determine his status,[16] any habeas petition filed thereafter by Mr. Hamdi would be in the nature of a collateral attack and the appropriate degree of judicial review of the prior tribunal's fact-finding would present a different question than that posed by this case. Absent such a prior judicial or quasi-judicial proceeding, the federal court's power and obligation to find facts of jurisdictional and constitutional significance must be plenary. *See Crowell*, 285 U.S. at 64; *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496-97 (1991) (because litigants alleged that the INS's procedures for making deportation decisions "do not allow applicants to assemble adequate records," judicial review of the litigants' constitutional claims could not be confined to the record created by the INS).

The Court of Appeals' reluctance to entertain judicial inquiry into the facts that underlie Mr. Hamdi's detention was largely premised on assumptions about interference with military activities and second-guessing of military decisions. *Hamdi III*, 316 F.3d at 473-74. Its approach, however, betrays a mistaken mistrust of the federal courts' ability to engage in the sensitive balancing of executive needs and individual rights. In *Webster v. Doe*, 486 U.S. 592, 604 (1988), for example, this Court observed that district courts are capable of balancing a plaintiff's discovery needs in a wrongful termination case "against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." Similarly, in *Zadvydas v. Davis*, 253 U.S. 678 (2001), the Court

15. This brief does not address the question of whether a military tribunal would be a proper tribunal in which to try Mr. Hamdi's alleged status as unlawful combatant.

16. *See* footnote 5, *supra*.

acknowledged the significant administrative, as well as policy-based, reasons to defer to the executive in implementing the nation's immigration laws. Nonetheless, the Court "believe[d] that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700.

Cases involving the military raise similar concerns but should elicit a similar response. A habeas court can defer to the Commander-in-Chief where deference is due without relinquishing its historic role. For example, we would not expect a court to second-guess the determination of the U.S. military to enter Afghanistan, to identify the Taliban as its foe, to work with the Northern Alliance, and to conduct the war as it deemed fit. We would expect a habeas court to be empowered to ascertain whether, for example, the evidence on which the military claims to have relied in branding Mr. Hamdi an "affiliate" of the Taliban really exists. We would also expect a habeas court to hear Mr. Hamdi's side of the story and judge, as courts are expert in doing, whether it is credible. Indeed, independent review of the facts alleged by the government to justify his detention would be particularly meaningful in correcting unwarranted detentions when the initial capture occurs on a battlefield, where the opportunity for deliberation and accurate assessment of a person's identity and status is least likely.

C. The History and Purpose of Habeas Corpus Prohibit the Unquestioning Acceptance of Executive Representations as Adequate Grounds for Detention

The decision below is not only inconsistent with this Court's holdings that protect judicial independence as an integral element of the separation of powers, but also with the singular history and purpose of habeas corpus as a check on the executive branch. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

1. *Early English courts regularly inquired into the factual basis for confinement*

In *St. Cyr*, this Court held that the Suspension Clause of the Constitution at minimum protects the writ as it existed in 1789. *Id.* Habeas corpus practice at the time of adoption of the Constitution permitted courts to look behind the factual averments of the Government that were offered to justify detention.

Early English cases granting habeas relief to prisoners detained without process by individual Privy Council[17] members held that a return merely claiming the executive's authority to hold a detainee, without more, was insufficient to justify continued incarceration. *See, e.g.*, *Hellyard's Case*, 74 Eng. Rep. 455 (C.P. 1587); *Peter's Case*, 74 Eng. Rep. 628 (C.P. 1587). With small initial steps such as these, the common law courts began to claim for themselves the power to require that executive detentions conform to law, rather than to the whim or caprice of those in power.

In 1628, Parliament enacted the Petition of Right, which abolished the sovereign's right to arrest and detain without showing cause. 3 Car. 1, ch. 1 (1628). This Court has observed that the Petition of Right was prompted by attempts by the monarch to employ martial law as a means of visiting summary punishment on civilians. *See Duncan*, 327 U.S. at 320. The same act also abolished the Court of Star Chamber, which had been widely reviled as an instrument of the arbitrary – and unappealable – exercise of executive power. Its abolition underscored Parliament's recognition that a tribunal that existed merely to place a rubber stamp of judicial imprimatur on decisions of the executive presented a threat to the meaningful exercise of the right to habeas corpus. After the Restoration,

17. The Privy Council was the predecessor to an executive agency: the "organ through which the King [or Queen] carried on the work of government." WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 40 (1980) (hereinafter DUKER).

Parliament enacted the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (1679), with additional provisions designed to prevent avoidance of the writ by the executive. The right to a factual inquiry into the causes stated in the return was not made statutory until the Habeas Corpus Act of 1816, 56 Geo. 3, c. 100 (1816), but earlier courts applying the common law writ recognized the necessity of meaningful consideration of the factual basis for confinement. Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535 (1998).

For example, in the well-known *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), the Court of Common Pleas rejected the argument that it must accept as true the allegations in the return, stating that "we ought not implicitly think the commitment was re vera, for cause particular and sufficient enough . . . our judgment ought to be grounded on our own inferences and understandings. . . ." *Id.* at 1007-08. *See also Sommersett's Case*, 20 Howell's State Trials 1 (K.B. 1772) (holding a factual hearing on the return); *Rex v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761); *King v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (considering "divers affidavits" from both sides in deciding habeas petition).

Habeas cases involving the military were not treated differently. In *Goldswain's Case*, 96 Eng. Rep. 711 (K.B. 1778), the petitioner claimed wrongful impressment into the navy. The court held that neither "the court [n]or the party are concluded by the return of a habeas corpus, but may plead to it any special matter necessary to regain his liberty." *Id.* at 712. Further, the judges stated "that they could not willfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return." *Id. See also Good's Case*, 96 Eng. Rep. 137 (K.B. 1760) (relying on petitioner's affidavit to establish facts that entitled him to exemption from impressment).

At the time the U.S. Constitution was adopted, the English courts thus bequeathed a legacy of increasingly independent factual inquiry in resolving habeas petitions.

2. *The Framers recognized the vital importance of the writ as a meaningful check on executive power*

Deprived of the full protections of the writ, the colonies chafed under "arbitrary detention [of colonists] by royal governors and other officers of the executive branch" throughout New England and New York. Alan Clarke, *Habeas Corpus: The Historical Debate,* 14 N.Y.L. SCH. J. HUM. RTS. 375, 393 (1998). The colonists recognized the importance of habeas corpus to their personal freedoms and individual liberty. Cotton Mather, instructing Massachusetts's agents in London to request for Massachusetts the protections of the 1679 Act, wrote that without those protections "we are slaves. . . ." DUKER, *supra*, at 101. Alluding to the lack of meaningful review of, in particular, detentions ordered by the military, the colonists listed in the Declaration of Independence among their enumerated grievances the complaint that the King had "affected to render the military independent of, and superior to, the civil power," and "depriv[ed] us, in many cases, of the benefit of trial by jury." THE DECLARATION OF INDEPENDENCE para. 14, 20 (U.S. 1776).

The Framers were aware of the dangers of unchecked executive power, and viewed the separation of powers as the ultimate assurance of a just government, with the "separate and distinct exercise of the different powers of government . . . essential to the preservation of liberty." THE FEDERALIST No. 51 (Alexander Hamilton or James Madison). Further, the Framers recognized the essential power of habeas corpus as a check on unbridled executive power to arrest and detain. Quoting Blackstone, Alexander Hamilton wrote of the writ in Federalist No. 84:

> The practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny . . . "to bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly carrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a MORE DANGEROUS ENGINE of arbitrary government."

Three states, Georgia, Massachusetts, and North Carolina, included habeas corpus guarantees in their own constitutions prior to the Philadelphia Convention in 1787, and courts of all of the states recognized the common law writ. DUKER, *supra*, at 103, 106, 115. At the Convention, affirmations of the right to habeas review similar to those in the state constitutions were proposed, but were eventually rejected. Instead, its availability was presumed and debate focused on whether *any* grounds for suspension should be authorized. *Id.* at 127-131. The writ finally was made subject only to the limited restrictions of the Suspension Clause of Article I, section 9: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The First Congress passed the Judiciary Act of 1789, which granted the federal courts statutory authority to issue writs of habeas corpus to prisoners "in custody, under or by color of the authority of the United States." 1 Stat. 82 (1789).

3. *United States habeas decisions and legislation emphasize the vital role played by judicial inquiry into the factual justifications for confinement*

This Court soon had the opportunity to consider cases challenging confinement by the executive without findings in any tribunal to justify the action. In *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806), the habeas petitioner was committed to

prison on the basis of a meeting of several justices of the peace, at which (the warrant recited) it was decided "from the information, testimony and complaint of many credible persons, . . . that [petitioner was a] disturber of the peace." *Id.* at 450-51. Burford sought habeas relief from the Circuit Court, which ordered him remanded to custody. On appeal, this Court discharged him, stating that the representations of fact in the warrant were insufficient to support his confinement: "The fact, ought to have been established by testimony, and the names of the witnesses stated." *Id.* at 452. The essential deficiency in the Circuit Court's ruling was its uncritical acceptance of what amounted to bare allegations, rather than proof, adduced by the prosecutorial agency, the justices of the peace.

Ex parte Bollman, 8 U.S. (3 Cranch) 75 (1807), decided by the Marshall Court in the same year, involved a habeas petition brought by two alleged co-conspirators of Aaron Burr, who were held in military detention on the charge of treason. This Court refused to accept the facts alleged by the government, and engaged in a lengthy examination of the evidence presented by both sides, including affidavits and testimony, eventually determining that the evidence did not support petitioners' continued detention and ordering them released. *Id.* at 133-37.

Similarly, in several wrongful impressment habeas cases decided during the War of 1812, state and lower federal courts inquired into the factual basis of confinement, taking testimony beyond the return. *See, e.g., Commonwealth v. Harrison*, 11 Mass. (1 Tyng) 63, 65 (1814) (examining evidence showing that the enlistee was a minor, stating "[t]his Court has authority – and it will not shun the exercise of it on proper occasions – to inquire into the circumstances under which any person brought before them by writ of *habeas corpus* is confined or restrained of his liberty"); *In re Stacy*, 10 Johns. 328 (N.Y. 1813) (examining multiple affidavits provided by the habeas petitioner, and stating, "we must act, as the courts have always, of necessity, acted, in like cases, upon the return itself and the accompanying

affidavits of the complainant"); *United States v. Bainbridge*, 24 F. Cas. 946, 952 (C.C.D. Mass. 1816) (No. 14,497) (where a factual question arises regarding a parent's consent to the enlistment of his minor son, it would be "necessary to have required more explicit affidavits than have been made").

The Habeas Corpus Act of 1867, in the midst of Reconstruction, further expanded the scope of habeas review. First, the writ was made available to prisoners held under color of state law to challenge confinement in violation of the federal Constitution or federal law. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867)) (hereinafter "1867 Act"). Second, and more pertinent here, Congress provided that petitioners could "deny any of the facts set forth in the return" and "allege any fact to show that the detention is in contravention of the constitution or laws of the United States." *Id.* Congress instructed that the court then "proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested." *Id.*

When Congress overhauled the Judiciary Code in 1948, it added two new provisions that it believed codified existing procedures in habeas matters. *See* H.R. REP. No. 80-308, at A179 (1948). Congress allowed either party to submit affidavits in lieu of oral testimony, which could then be answered by affidavits or interrogatories from the opposing party. 28 U.S.C. § 2246. In addition, Congress intended that the allegations in the government's return to the habeas petition should be critically reviewed, and not assumed true if "the judge finds from the evidence that they are not true." 28 U.S.C. § 2248.

Those provisions not only give courts a variety of mechanisms by which they may find the facts, but impose upon them a duty to engage in factual inquiry rather than uncritically accept the executive's representations. Were the rule otherwise, the Great Writ would be toothless. Just three Terms ago, for example, this Court held that the habeas court was not required to "accept the Government's view about whether the

implicit statutory limitation [on the executive's power to detain] is satisfied in a particular case, conducting little or no independent review of the matter." *Zadvydas*, 533 U.S. at 699 (citing 28 U.S.C. § 2241).

Similarly, in *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court invalidated a state's determination that a death row prisoner was sane, a determination made unilaterally by state executive appointees. A majority of the Court agreed that such a determination, made by the executive without affording the prisoner any opportunity to be heard, did not comport with due process. *See Ford*, 477 U.S. at 410-11.[18] "[P]erhaps the most striking defect" in the state procedures was the "placement of the decision wholly within the executive branch. . . . In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal." *Id.* at 415-16. As Justice Powell observed, "the Governor's finding is not entitled to a presumption of correctness" because the "essence of a 'court' is independence from the prosecutorial arm of government and . . . the Governor is '[t]he commander of the State's corps of prosecutors.'" *Id.* at 423 (Powell J., concurring in part).

The panel decision below violates all the key mandates that Congress wrote into the modern habeas corpus statute. The district court has been stripped of the power to "hear and determine the facts." 28 U.S.C. § 2243. The district court has been directed to accept as conclusive the affidavit of an executive officer, but without affording the petitioner the opportunity to propound interrogatories to the affiant in violation of section 2246. And, the district court has been directed not to permit a traverse by the petitioner of the facts alleged by the government and instead has been directed to accept the facts alleged by the government to be true, in violation of

18. Three concurring Justices agreed on this point with the four Justices who joined the plurality opinion. *See Ford*, 477 U.S. at 424 (Powell, J.); *id* at 430 (O'Connor, J., joined by White, J.).

section 2248. Seen in historical context, the holding below represents an unwarranted refusal to apply congressionally-mandated procedures that embody the long struggle to establish the writ of habeas corpus as an effective means to judicially contest an executive detention.

4. *Absent suspension of the writ by Congress, the habeas court cannot be compelled to accept the executive's allegation of jurisdictional facts*

The Suspension Clause is integral to the separation of powers. Although the Framers recognized that there were some extreme circumstances in which a suspension may be necessary, by limiting the circumstances under which a suspension would be available, they ensured that suspensions would be rare. Further, in vesting the power to suspend in Article I, rather than Article II, the Framers secured an essential element of the delicate system of governmental checks and balances. Because the core purpose of habeas corpus relief was to challenge executive detentions, the Framers ensured that the branch whose actions would be reviewed on a habeas petition was not also the one with the power to suspend habeas protections. *See Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring in part and concurring in the judgment) ("transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention"); *see also* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2495 (1998).

In the early days of the Civil War, Chief Justice Taney, sitting as Circuit Justice in *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487), confirmed that only Congress can suspend the writ. John Merryman had been arrested and imprisoned on the charge of treason, without any form of hearing, by a military officer acting at the order of President Lincoln. *Id.* at 147-48. Merryman applied for habeas corpus,

and the Chief Justice ordered the military commander to produce the prisoner. The officer refused to produce Merryman, arguing that he had been authorized by President Lincoln to suspend the writ. *Id.* Chief Justice Taney described the case in terms strikingly similar to the facts presented by Mr. Hamdi, nearly a century and half later:

> [A] military officer . . . without any application to the judicial authorities, assumes to himself the judicial power . . . undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing . . . to close custody, in a strongly garrisoned fort, to be held there, it would seem, during the pleasure of those who committed him.

Id. at 152. The Chief Justice, relying on the English history of habeas corpus and the suspension power, Blackstone's Commentaries, the language of the Suspension Clause itself and its placement in Article I, and *Ex parte Bollman*, concluded that there was "no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of habeas corpus. . . ." *Id.* at 149.

If the executive cannot for reasons of military necessity suspend the writ absent congressional authorization, neither can a court do so in an effort to safeguard the executive's military powers from supposed interference by the judiciary. The Fourth Circuit decision misunderstood why its decision is incompatible with the Suspension Clause. *See Hamdi III*, 316 F.3d at 467 n.5. Its decision suspends the writ not because it refused to grant petitioner relief, but because it limits judicial review of his detention to no more than would apply if the writ were suspended.

Suspension practice in England under the 1679 Act limited the power to Parliament, which could, through an Act with a specific expiration date, empower the Crown to detain a particular individual or class of individuals suspected of High Treason or another specified offense without bail or trial. DUKER, *supra*, at 141-42. The suspension of the writ did not, however, strip the detainee of all right to question the propriety of his detention. A prisoner detained under a suspension order could still apply for habeas relief to determine the sufficiency of the warrant on which he was detained; only if the warrant showed that the detainee was within the class of individuals whose rights to habeas relief were suspended would the court refuse to entertain the petition. *See id.* at 142 & nn.120-21 (citing *Rex v. Earl of Orrery,* 88 Eng. Rep. 75 (1722)). Suspension practice in the United States has followed the same model. *See Ex parte Milligan*, 71 U.S. 2, 130-31 (1866) ("[T]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return . . . the court decides whether the party applying is denied the right of proceeding any further with it.").

Suspension has not been authorized in this case, and could not have been authorized because there has been no rebellion in or invasion of the United States. Nonetheless, the Fourth Circuit has reached a result that is strikingly similar to the more limited judicial function that obtains when the writ has been suspended. The court below based its determination that no habeas relief could be granted solely on the facts alleged in the Mobbs Declaration, holding that the executive's determination that Mr. Hamdi was an "enemy combatant" was conclusive. That is the same limited form of judicial review as would obtain had Congress suspended the writ as to U.S. citizens who are enemy combatants. In reaching that result, the Court below intruded on both the exclusive congressional power to suspend the writ in appropriate cases, and on the judicial power to adjudicate petitions properly before the court.

CONCLUSION

The decision below should be reversed, and the district court directed to hear and determine the facts, and dispose of the matter as law and justice require.

Respectfully submitted,

DEBORAH PEARLSTEIN
THE LAWYERS COMMITTEE
FOR HUMAN RIGHTS*
333 Seventh Avenue
13th Floor
New York, NY 10001-5004
(212) 845-5200

* *Now known as Human Rights First*

ROBERT P. LOBUE
Counsel of Record
ALEXIS GANDER
ADEEL A. MANGI
CLARE F. SAPERSTEIN
CARRIE A. SYME
PATTERSON, BELKNAP, WEBB
& TYLER LLP
1133 Avenue of Americas
New York, NY 10036
(212) 336-2000

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,

Respondents.

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Fourth Circuits

BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

JOHN CORNYN
Counsel of Record
Chairman, U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510
(202) 224-7840

Counsel for Amicus Curiae

QUESTION PRESENTED

This brief will address the following question:

Whether the President, acting pursuant to Congressional authorization to use force in response to the terrorist attacks of September 11, 2001, has the authority to detain two American citizens whom he determined were enemy combatants, presenting ongoing threats to the safety of the United States.

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BRIEF FOR UNITED STATES SENATORS JOHN CORNYN AND LARRY E. CRAIG AS AMICUS CURIAE IN SUPPORT OF DONALD H. RUMSFELD

INTEREST OF THE AMICUS CURIAE[1]

John Cornyn and Larry E. Craig are members of the United States Senate currently serving in the One Hundred Eighth Congress. Senator Cornyn is Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. Senator Craig is a member of the subcommittee. The Senators strongly support the Authorization for Use of Military Force joint resolution approved during the 107th Congress by a 98-0 vote in the Senate and a 420-1 vote in the House. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001) ("Joint Resolution"). The Senators firmly believe that the Joint Resolution provides ample authorization for the detention of Yaser Hamdi and Jose Padilla as enemy combatants, and that any decision to the contrary by this Court would contradict and undermine that act of Congress.

INTRODUCTION

a. On September 11, 2001, members of the al Qaeda terrorist network launched a treacherous, savage attack on the United States. Four planes were hijacked within one hour. Two struck the World Trade Center in New York City, a third struck the Pentagon in Washington D.C., and a fourth, likely intended for another target in Washington, D.C.,

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

crashed in a Pennsylvania field due to the heroic efforts of several passengers. Terrorists claimed the lives of approximately three thousand innocent Americans and foreign nationals that tragic morning.

In response to this act of war, President George W. Bush deployed the United States military against al Qaeda and the Taliban regime in Afghanistan, which harbored and supported the terrorists. The President acted pursuant to the Joint Resolution enacted within a week of the September 11 attacks, which authorized the President to use force against any person, organization, or nation responsible for the attacks, or any nation that harbored them. In conjunction with its allies and a coalition of local military groups known as the Northern Alliance, the United States succeeded in driving the Taliban dictatorship from power and restoring a legitimate government to Afghanistan. The broader war against al Qaeda continues to this day.

b. In November 2001, during the course of military operations in Afghanistan, Yaser Esam Hamdi was captured by Northern Alliance troops when his military unit surrendered on the battlefield. Armed with an AK-47 assault rifle at the time of his capture, Hamdi was detained in several military prisons in Afghanistan. Interrogations revealed that Hamdi came to Afghanistan in July or August of 2001, where he became affiliated with a Taliban military unit and received weapons training. Hamdi was eventually transferred from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. On April 5, 2002, upon discovering that Hamdi apparently was born in Louisiana and never renounced his U.S. citizenship, officials transferred him to a naval brig in Norfolk, Virginia. The government has provided Hamdi with access to the brig commander and the chaplain, and has recently allowed him to consult with a lawyer under appropriate supervision.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia filed a writ of habeas corpus as

Hamdi's "next friend," challenging the legality of his detention. The District Court found that the suit was properly brought. *Hamdi* J.A. 113-116. It ordered that Hamdi receive counsel, and that the government provide more evidence that Hamdi's detention was justified. The Fourth Circuit reversed on the narrow ground that the Public Defender's petition was unnecessary because Hamdi's father "was ready, willing, and able to file, and in fact has filed, a petition as Hamdi's next friend." *Hamdi v. Rumsfeld*, 294 F.3d 598, 600 (4th Cir. 2002) (*Hamdi I*). Ruling on the writ of habeas corpus brought by Hamdi's father, the District Court ordered that the Public Defender should have unmonitored access to Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002). On appeal, the Fourth Circuit again reversed. *Hamdi v. Rumsfeld*, (4th Cir. 2002) (*Hamdi II*) (*Hamdi* J.A. 332-44). The court reversed the District Court's unwarranted assumption "(1) that Hamdi is not an enemy combatant, or (2) even if he might be such a person, he is nevertheless entitled not only to counsel but to immediate and unmonitored access thereto." *Hamdi* J.A. 340. The Fourth Circuit remanded the petition to the district court so that it could "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 343.

On remand, the District Court remained dissatisfied with the government's basis for detaining Hamdi, *see Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (*Hamdi* J.A. 282-99), notwithstanding the Declaration submitted by the Special Advisor to the Under Secretary of Defense for Policy (*Hamdi* J.A. 148-150). The Declaration explained the circumstances of Hamdi's capture, and stated that he met the government's screening criteria for those classified as enemy combatants. Dissecting the Declaration line by line, the District Court demanded that the government produce substantial additional information to justify the detention. Once again, the Fourth Circuit reversed. *Hamdi v. Rumsfeld*,

316 F.3d 450 (4th Cir. 2002) (*Hamdi III*) (J.A. 415-55). It held that "the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition." J.A. 418. Over four dissenting votes, the Fourth Circuit denied rehearing *en banc*. *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (denial of rehearing *en banc*) (*Hamdi IV*) (J.A. 458-533).

This Court granted certiorari, *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696).

c. On May 8, 2002, Jose Padilla flew from Pakistan, via Switzerland, to Chicago O'Hare International Airport. Shortly after exiting the plane, FBI agents arrested him pursuant to a material witness warrant issued by the Chief Judge of the Southern District of New York. The warrant sought to enforce a subpoena requiring Padilla to testify before a grand jury on matters related to September 11. Within one week, Padilla, an American citizen, was transferred to the Metropolitan Correctional Center in New York City, where he was officially under the control of the Bureau of Prisons and the United States Marshall Service.

On May 15, Chief Judge Mukasey appointed Donna R. Newman as Padilla's counsel. On May 22, Newman filed a motion to vacate the material witness warrant. Before the court ruled on the motion, the United States withdrew its subpoena, because the President issued an Order on June 9, 2002, designating Padilla as an enemy combatant and directing Secretary Rumsfeld to detain him. Pursuant to this Order, Padilla was taken into custody by Department of Defense personnel and moved to a naval brig in Charleston, South Carolina.

The President found in his June 9 Order that Padilla "is, and at the time he entered the United States in May 2002

was, an enemy combatant," and that he "represents a continuing, present and grave danger to the national security of the United States." *Padilla* Pet. App. 57a-58a. The Order further stated that "Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism," and that he possesses intelligence that "would aid U.S. efforts to prevent attacks by al Qaeda." *Id.* at 57a.

This Order, in turn, was based on a Declaration of the Special Advisor to the Under Secretary of Defense for Policy. *Padilla* Pet. App. 167a-172a. The Declaration explained that Padilla was born in New York, convicted of murder as a minor, imprisoned on handgun charges after his 18th birthday, and left the United States for the Middle East and Southwest Asia in the late 1990s. At that time, Padilla became closely associated with known members of al Qaeda. While in Afghanistan in 2001, Padilla conspired with al Qaeda members to build and detonate a "dirty bomb" within the United States. He went to Pakistan to receive explosives training from al Qaeda operatives, and subsequently flew to Chicago, where he was arrested.

Four judicial opinions have addressed Padilla's status and legal claims. The first held that court-appointed counsel Donna Newman had standing as "next friend" to bring a habeas petition; that the court had jurisdiction over the matter; that Secretary Rumsfeld was properly named; and that the court would use a "some evidence" standard to determine whether Padilla was validly detained as an enemy combatant. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2002) (*Padilla I*) (*Padilla* Pet. App. 76a-166a). It also held that Padilla should be permitted to consult with counsel, and gave the parties four weeks to agree upon a mutually satisfactory way to comply with that holding. The government requested reconsideration of the

court's decision, arguing that access to counsel was not legally required and would compromise national security. The court adhered to its original holding. *Padilla ex rel. Newman v. Rumsfeld,* 243 F. Supp. 2d 42, 43-46 (S.D.N.Y. 2003) (*Padilla II*). The government then moved for certification of the ruling in order to pursue interlocutory review on the issues it lost. *See* 28 U.S.C. § 1292(b). The court certified six questions for appeal. *See Padilla ex rel. Newman v. Rumsfeld,* 256 F. Supp. 2d 218, 222-23 (S.D.N.Y. 2003) (*Padilla III*).

On appeal, a divided Second Circuit panel affirmed in part and reversed in part. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (*Padilla IV*) (*Padilla* Pet. App. 1a-75a). The majority first held that the district court properly asserted habeas jurisdiction over the matter. It then noted that "great deference is afforded the President's exercise of his authority as Commander-in-Chief," *Padilla* Pet. App. 30a, and even specifically acknowledged that "the government had ample cause to suspect Padilla of involvement in a terrorist plot," *id.* at 4a n.2. Nevertheless, the majority concluded that the President had no authority to detain Padilla as an enemy combatant. It reasoned that 18 U.S.C. § 4001(a), an obscure statute buried in the "Prisons and Prisoners" section of the United States Code, prohibits the detention of enemy combatants during wartime without express Congressional authorization. *Padilla* Pet. App. 43a-50a. Finding no Congressional authorization despite Congress's sweeping Joint Resolution, the Second Circuit remanded to the district court with instructions to release Padilla from military custody within 30 days. *Id.* at 50a-56a. Judge Wesley dissented from this holding, arguing that, if § 4001(a) is – as the majority claims – "an impenetrable barrier to the President detaining a U.S. citizen who is alleged to have ties to the belligerent and who is part of a plan for belligerency on U.S. soil, then § 4001(a), in my view, is unconstitutional." *Padilla* Pet. App. 74a (Wesley, J., dissenting in part and

concurring in part). He also criticized the majority's "strained reading" of Congress's "strong and direct" Joint Resolution, which, in his opinion, clearly authorized the President to detain enemy combatants. *Id.* The majority's interpretation of the Joint Resolution, he argued, was based on a "false distinction between the use of force and the ability to detain." *Id.* at 70a.

This Court granted certiorari, *Rumsfeld v. Padilla*, __ S. Ct. __, 2004 WL 95802 (U.S. Feb 20, 2004) (No. 03-1027).

SUMMARY OF ARGUMENT

The Fourth Circuit correctly upheld the President's detention of Mr. Hamdi as an enemy combatant. The Second Circuit was wrong to conclude that the President lacked the authority to detain Mr. Padilla as an enemy combatant.

a. The United States is at war. On September 11, 2001, the al Qaeda terrorist organization launched a series of coordinated acts of war against our country. Within days, two events marked Congress's official recognition of a state of war. On September 14, President Bush declared a national emergency in response to the September 11 attacks. This triggered the President's war powers as recognized in section 2(c) of the War Powers Resolution. 50 U.S.C. § 1541(c). And on September 18, Congress approved by overwhelming margins the Joint Resolution, which constitutes the "specific statutory authorization" contemplated by the War Powers Resolution to use "all necessary and appropriate force" against al Qaeda. The Constitution vests the war powers exclusively in the President and Congress. This Court has never contradicted the political branches' determination of a state of war. Nor has it ever questioned Congress's ability to authorize the President to conduct war. The separation of powers and principles of justiciability require that courts leave these questions to the political branches.

b. The President's power to detain enemy combatants falls within the Joint Resolution authorization to use "all necessary and appropriate force." As a matter of text, logic,

and the precedents of this Court, the greater and more deadly power to use lethal military force encompasses the lesser power to detain. A contrary holding would lead to absurd results and perverse incentives, and would upset this Court's tradition of deference to the political branches in times of war.

c. Neither citizenship nor location of capture affects the President's wartime authority to detain enemy combatants. Any other conclusion would offend tradition, *Ex parte Quirin*, 317 U.S. 1, 37 (1942), and logic. Both Hamdi and Padilla fall squarely within *Quirin*, and no other decision of this Court can fairly be read to suggest otherwise.

d. 18 U.S.C. § 4001(a) does not apply to the President's wartime power to detain enemy combatants. Neighboring sections and the entire U.S. Code reveal the provision's limited scope. Moreover, the well-established avoidance canon, which assumes special meaning in the context of foreign affairs, requires that section 4001(a) be given this narrow meaning. And nothing in the legislative history justifies a broader interpretation. Finally, in any event, the Joint Resolution constitutes an "Act of Congress" authorizing the detentions even under section 4001(a).

ARGUMENT

I. THE UNITED STATES IS AT WAR.

There can be little doubt that the savage attacks on the United States on September 11, 2001, were acts of war. Although launched from within the United States, they were carried out by a foreign terrorist organization whose aim is to mercilessly kill innocent American civilians in order to force the United States out of the Middle East region and to promote its virulent, extremist political philosophy. The attacks killed approximately three thousand Americans and foreign nationals, and targeted political, military, and financial centers of the United States. It is only because of the brave sacrifice of passengers on a fourth jet that crashed

in rural Pennsylvania that al Qaeda did not succeed in attacking either the White House or the Capitol Building in addition to the Pentagon and the World Trade towers. September 11 followed a series of other attacks by al Qaeda launched against Americans abroad, including the 2000 attack on the U.S.S. Cole in Yemen, the 1998 bombing of our embassies in Kenya and Tanzania, the 1996 bombing of a military housing complex in Saudi Arabia, and the 1993 bombing of the World Trade Center.

On September 18, 2001, by votes of 98-0 in the Senate and 420-1 in the House, Congress found that "these grave acts of violence" posed a direct threat to the national security and foreign policy of the United States and that they "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." 115 Stat. 224. It found that it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Accordingly, the Joint Resolution authorized the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[2]

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[2] There is no constitutional requirement that Congress's power to declare war be exercised through a formal declaration. "Of course, a state of war may in fact exist without a formal declaration." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring). *See also Bas v. Tingy*, 4 U.S. 37, 40-41 (1800). In fact, no declaration was necessary, as a state of war was automatically triggered by the September 11 attacks by al

Further proof that Congress recognizes the existence of a state of war is found in the War Powers Resolution. The Resolution provides that the President can exercise his Commander-in-Chief powers "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). Conditions two and three have been met: the nation suffered a direct attack on September 11, and the Joint Resolution provides the President with "specific statutory authorization" to use force against those responsible.[3] Both the Joint Resolution and the War Powers Resolution affirm that Congress has recognized the existence of a state of war.

The President has likewise concluded that the September 11 attacks initiated a war. Shortly after September 11, President Bush declared a national emergency. Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sep. 14, 2001). He declared "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," triggering the President's war powers authority pursuant to the War Powers Resolution. 50 U.S.C. § 1541(c)(3). In his September 18 signing statement accompanying the Joint Resolution, President Bush declared: "Our whole Nation is unalterably committed to a direct, forceful, and comprehensive response

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Qaeda an international terrorist organization that declared war on the United States as early as 1996. *See, e.g.*, U.S. Dep't of State, *Fact Sheet: The Charges Against International Terrorist Usama bin Laden* (Dec. 15, 1999), *available at* http://usinfo.state.gov/topical/pol/terror/99129502.htm.

[3] Section 2(b)(1) of the Joint Resolution states: "Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.." 115 Stat. 224.

to these terrorist attacks and the scourge of terrorism directed against the United States and its interests." In a November 2001 order, the President found that the attacks "created a state of armed conflict." 66 Fed. Reg. 57,833 (Nov. 13, 2001).

The President and Congress are charged under the Constitution with all of the federal government's war power. This includes the sole power to decide whether war exists, the measures to be taken to successfully prevail, and the direction of the military forces of the United States to achieve the goals of the war.[4] Furthermore, the Constitution requires that the decision of the political branches charged with the war power binds the federal judiciary. The federal courts have no authority to contradict a determination by the President and Congress that a state of war exists. This Court recognized this proposition as long ago as the Civil War. In reviewing whether the outbreak of the Civil War constituted a war, this Court recognized that a presidential proclamation of an outbreak of hostilities and the imposition of a blockade of the Southern states was sufficient action by the political branches to determine that war existed.[5]

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[4] "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870).

[5] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (emphasis added):

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and *this Court must be governed by the*

Indeed, this Court has never exercised its power of judicial review to decide whether war existed contrary to the decision of the President and Congress. The political question doctrine bars any such judicial decision, because the issue is textually given to the Congress via the Declare War Clause and the President through the Commander-in-Chief power, and because it is one for which judicially-manageable standards do not exist. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). The federal courts do not have the expertise or capability to determine whether the actions undertaken by the government are necessary or appropriate for fighting a war, and they risk interference with the nation's need for a single, unitary national security policy in regard to an international armed conflict. This is particularly the case in the war against al Qaeda, a war unlike any modern war this country has faced. The judicial branch has no constitutional standards to apply to determine whether a war can exist with an enemy which, though lacking the territory and population of a traditional enemy nation-state, has the capability and intention to attack the United States with the power of a nation-state. The separation of powers and principles of nonjusticiability require that this Court accept the decision of the political branches that the nation is at war.

To exercise judicial review over the decision on war would represent an unprecedented intrusion into the prerogatives of the President and Congress and their determined efforts at cooperation in this war. In the Joint Resolution, Congress found that the United States had suffered a direct attack and delegated to the President the full

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decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

extent of powers necessary and appropriate to exercise self-defense and to prevail in the conflict with al Qaeda. And as explained earlier, this Court has never questioned a Congressional determination about a state of war.

Moreover, judicial second-guessing of the political branches is particularly inappropriate in this case. This Court has long rejected the notion that suits brought by private individuals, including habeas petitions, may be used to question the Legislative and Executive's determination that our nation is at war. "Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *see also The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).[6] After all:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

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[6] In fact, *The Prize Cases* suggest that we were at war the moment the terrorists attacked us, regardless of what Congress authorized. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. at 668.

Eisentrager, 339 U.S. at 779. Accordingly, no lower federal court has questioned the joint decision of the President and Congress that this nation is indeed currently at war.[7]

II. AS A MATTER OF EXPRESS LANGUAGE, COMMON SENSE AND JUDICIAL DOCTRINE, "ALL NECESSARY AND APPROPRIATE FORCE" IN THE JOINT RESOLUTION INCLUDES THE POWER OF DETENTION.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Dames & Moore v. Reagan*, 453 U.S.

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[7] *See, e.g., Flynt v. Rumsfeld*, __ F.3d __, 2004 WL 190072 (D.C. Cir. 2004) ("Shortly after the September 11, 2001, terrorist attacks, the United States military began combat operations in Afghanistan in support of the global war on terrorism."); *In re Sealed Case*, 310 F.3d 717, 732-33 (For. Intel. Surv. Rev. 2002) (describing "law enforcement efforts in the war against terror"); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (Becker, C.J.) ("The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."). In addition to all branches of the United States government, foreign entities also acknowledge that the United States is engaged in a bona fide war. For example, "the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), and the remaining parties to the Security Treaty between the United States, Australia, and New Zealand (ANZUS), have all concluded that the September 11 attacks activated the mutual self-defense clauses of their treaties involving the United States." John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207, 212-13 (2003) (footnotes omitted).

654, 668, 661-62 (1981). Because President Bush's decisions to detain Hamdi and Padilla are expressly supported by the Joint Resolution, they are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown,* 343 U.S. at 637.

The Joint Resolution specifically authorizes "the President ... to use all necessary and appropriate force" against those individuals, organizations and nations that he determines participated or helped to cause the September 11 attacks. The greater, and more lethal, power to use military force against the enemy necessarily includes the lesser power to detain them. Any other reading would offend logic, common sense, and judicial precedent.

As a logical matter, the power to use military force includes the power to detain. There is no conceivable reason why the greater power – in this case, one that involves the power to take the life of another – would not include the lesser. While a deprivation of liberty is undoubtedly serious, it cannot reasonably be considered worse than or even equivalent to the deprivation of one's life.[8] Further, detention itself centrally involves the use of force. When the U.S. military initially captured and detained Hamdi and Padilla, it *compelled them by physical means* to stop their efforts on behalf of the Taliban and al Qaeda, and moved them to prison facilities. Hamdi and Padilla remain in naval brigs because they are compelled both by physical means and by

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[8] The district court in *Padilla I* made exactly this point in its interpretation of *Quirin*. *See Padilla I*, 233 F. Supp. 2d at 595 ("If, as seems obvious, the Court in fact regarded detention alone as a lesser consequence than the one it was considering – trial by military tribunal[, which could lead to death or imprisonment] – and it approved even that greater consequence, then our case is *a fortiori* from *Quirin* as regards the lawfulness of detention under the law of war.").

legal requirement to remain there. The U.S. government literally uses guards and weapons to keep them in captivity as enemy combatants.

Hamdi and Padilla's proposed construction would lead to an absurd result. *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). "It would be curious if the resolution authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person." *Padilla* Pet. App. 70a-71a (Wesley, J., dissenting in part and concurring in part). Indeed, Hamdi and Padilla's construction would create a perverse incentive to use *more* force than is "necessary and appropriate" in some situations. If handcuffed by a judicial decision that U.S. forces have no power of detention, U.S. soldiers may be faced with the choice between inflicting violence and letting a potentially deadly terrorist go free. Without the reasonable and time-honored option of detention, troops will be forced to kill or maim enemy combatants because they dare not let them go free.

This Court has agreed with this logic before. In *Moyer v. Peabody*, 212 U.S. 78 (1909), Justice Holmes concluded for the Court that an executive's authority to use force includes the lesser power to detain. During an uprising in Colorado, the governor exercised his Commander in Chief powers under the state constitution to "suppress insurrection, and repel invasion." *Id.* at 82. Pursuant to this power, he detained one citizen for over two months. This Court found that the detention of the citizen was legal under the state constitution's authorization to the governor to use force. Justice Holmes's opinion is instructive on this score. The state constitutional provision, he observed, "means that [the governor] shall make the ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." *Id.* at 84. "Such arrests are not necessarily for punishment,

but are by way of precaution, to prevent the exercise of hostile power." *Id.* at 84-85. When the executive is authorized "with regard to killing men in the actual clash of arms . . . the same is true of temporary detention to prevent apprehended harm." *Id.* at 85. "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection . . . we are of opinion that the same is true of a law authorizing by implication what was done in this case." *Id.* This Court has thus recognized that the greater power to use force implies the lesser power to detain.

This conclusion is reinforced by a long tradition of judicial deference to the political branches during times of war. "[T]he Framers 'did not make the judiciary the overseer of our government.'" *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)). The President in particular is afforded great latitude in the execution of his core Commander-in-Chief powers during wartime. "[U]nless Congress *specifically* has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added).[9]

Hamdi and Padilla ask this Court to violate its own standards of deference, demanded by the separation of

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[9] *See also Quirin*, 317 U.S. at 25 (courts cannot interfere with Executive Branch decisions to detain enemy combatants "without the *clear* conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted") (emphasis added); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (when Congress and the President are acting in concert during wartime, "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"). This case presents no conflict of opinion between the political branches. And even in cases involving such interbranch disagreement, courts would decide only which of the two political branches controls.

powers, by asking it to find that the Joint Resolution did not authorize their detention, despite its sweeping language to the contrary. They would have this Court ignore clear Congressional intent to authorize the President to exercise all military powers needed to successfully prosecute war. That would invade Congress's prerogative to decide whether and how to delegate authority to the Executive Branch in wartime. Further, Hamdi and Padilla would impose an unwarranted burden on Congress to enumerate all possible powers when delegating authority to the President. Their position, for example, would require that Congress not only authorize the President to use force, but also separately authorize him to arrest the enemy, to detain the enemy, to accept the surrender of the enemy, to interrogate the enemy, to release detainees, and so on. This argument fails to respect the Constitution's vesting of all of the war power in the political branches, and does not give due deference to Congress's role in deciding how to delegate authority to the President. Such judicial intervention in such matters is also unnecessary: if Congress believes that the President has overstepped his authority, it has numerous tools available to it to respond, including statutory amendment or withholding appropriations. It is difficult to imagine a greater judicial intrusion into the separation of powers than one that would dictate to the President and Congress how to conduct a war.

III. THE PRESIDENT'S WARTIME AUTHORITY IS UNAFFECTED BY AN ENEMY COMBATANT'S CITIZENSHIP OR THE LOCATION OF HIS CAPTURE.

The President's authority, both inherent and delegated, to detain enemy combatants in the course of a war has never been affected by the citizenship of the combatant.[10]

[10] *See, e.g.*, *Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency."); *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

Moreover, a rule that American citizens are constitutionally exempt from the federal government's war powers would offend both history and logic. During the Civil War, almost every Confederate soldier was an American citizen. A constitutional rule forbidding detention of American citizens as enemy combatants would have disastrously undermined the Union's ability to fight the Civil War. The impact on war of such an illogical rule would only be magnified during the current conflict. It would encourage America's enemies to recruit American citizens to carry out attacks such as September 11 in the hopes that they would be immune from the war power of the government.

The President's authority to detain enemy combatants is also unaffected by the location or manner of their capture. As this Court has unanimously held, all individuals, regardless of citizenship, who "associate" themselves with the "military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Quirin*, 317 U.S. at 37-38. Nothing further need be demonstrated to justify their detention as enemy combatants. The individuals need not be caught while engaged in the act of war or captured within the theater of war.[11] They need not

[11] *See id.* at 38 ("Nor are petitioners any the less belligerents if . . . they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.").

be found carrying weapons.[12] Nor must their acts be targeted at our military.[13] Accordingly, all "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants." *Id.* at 35.[14]

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[12] *See id.* at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons . . . .").

[13] *See id.* ("It is without significance that . . . their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States.").

[14] *Ex parte Milligan*, 71 U.S. (1 Wall.) 2 (1866), does not suggest otherwise. Milligan was arrested in Indiana and tried before a military tribunal for conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana. This Court found that the military could not apply the laws of war to citizens in a state that had never opposed the United States, and in which the civilian courts are open. *See id.* at 121-22. In reaching that conclusion, the *Milligan* court made clear that the laws of war did not apply to Milligan because "he lived in Indiana for the past twenty years, was arrested there, and had not been, during [the Civil War], a resident of any of the states in rebellion." *Id.* at 131. Moreover, this Court specifically concluded that Milligan "was not engaged in legal acts of hostility against the government." *Milligan*, 71 U.S. at 131.

The circumstances of Hamdi and Padilla are entirely different. Unlike Milligan, Hamdi and Padilla were closely "associate[d] with the "military arm of [an] enemy" at war with the United States. *Quirin*, 317 U.S. at 37-38. Hamdi was detained on the battlefield in Afghanistan, having taken up arms in direct conflict with the U.S. Armed Forces. As the district court noted in *Padilla I*, Padilla spent time in Afghanistan and elsewhere with known members of al Qaeda, including a senior Osama bin Laden lieutenant named Abu Zubaydah, just months before the

IV. 18 U.S.C. § 4001(a) DOES NOT APPLY TO THE PRESIDENT'S POWER DURING WARTIME TO DETAIN ENEMY COMBATANTS.

Hamdi and Padilla seek to escape the scope of the government's war power by arguing that 18 U.S.C. § 4001(a) trumps the Joint Resolution. Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." That provision, however, does not undermine or restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. Examined in the context of section 4001 and of the United States Code as a whole, subsection (a) does not reach so broadly. Moreover, the canon of construction that statutes be construed to avoid constitutional defects requires that section 4001(a) be construed not to interfere with the President's constitutional powers as Commander in Chief.

To be sure, section 4001(a) uses broad language. It neither draws a distinction between differing types of detention nor mentions military detention for explicit

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September 11 attacks. *Padilla* Pet. App. 85-86a. Padilla researched possible terrorist plans "at an al Qaeda safehouse in Lahore, Pakistan," and "discussed that and other proposals for terrorist acts within the United States with al Qaeda officials he met in Karachi, Pakistan, on a trip he made at the behest of Abu Zubaydah." *Id.* at 86a. The President's June 9 Order specifically states that "Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *Id.* at 57a.

86 years after *Milligan*, the Court in *Quirin* specifically limited *Milligan*, noting that that Court's holding had "particular reference to the facts before it." It is *Quirin*, and not *Milligan*, that applies here.

inclusion or exclusion.[15] It is important, however, to examine the law in its entirety to understand its scope. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Nothing in section 4001 indicates that its provisions were meant to reach the President's authority, as Commander in Chief, to detain enemy combatants.

Read in context, section 4001(a) addresses the Attorney General's authority to govern the federal civilian prison system – and *not* the President's constitutional wartime power as Commander in Chief to detain enemy combatants. Congress specifically added subsection (a) to section 4001 in 1971. Act of Sep. 25, 1971, Pub. L. No. 92-128, § 1, 85 Stat. 347. Prior to 1971, section 4001 simply gave the Attorney General the power to "control and manage[]" the federal civilian prison system. Act of June 25, 1948, ch. 645, § 4001, 62 Stat 683, 847. That earlier language is identical to subsection (b) today. Then, as now, the plain terms of the provision specifically carve out "military or naval institutions" from the statute's coverage of "Federal penal and correctional institutions." Accordingly, construing the scope of subsection (a) broadly, to cover all types of detention, is difficult to reconcile with its coupling with subsection (b). The better reading is that subsections (a) and (b) have the same scope, applying exclusively to the federal civilian prison system.

As a structural matter, the placement of section 4001(a) in the United States Code signifies that it was not intended to govern the detention of enemy combatants by the U.S. Armed Forces. Title 18 of the United States Code covers "Crime and Criminal Procedure." Statutes concerning the military and national security, by contrast, are generally found in Title 10 ("Armed Forces") and in Title 50 ("War

[15] Courts have found section 4001(a) to be judicially enforceable through the writ of habeas corpus. *See, e.g., Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978).

and National Defense"). Moreover, the particular part of Title 18 in which section 4001 is located contains chapters exclusively governing federal criminal confinement. Part III of Title 18, which contains section 4001, is entitled "Prisons and Prisoners" and contains chapters relating to the Bureau of Prisons, good time allowances, parole, and institutions for women, among other topics. Nothing in those provisions can plausibly be construed to apply to the detention of enemy combatants. Congress's decision to place section 4001(a) in this particular provision of the U.S. Code thus provides further support for the conclusion that subsection (a) does not apply to the President's constitutional power to detain enemy combatants.

Congress likewise has effectively construed section 4001(a) not to restrict the President's constitutional power as Commander in Chief to detain enemy combatants. In 1984, thirteen years after the enactment of section 4001(a), Congress added section 956 to Title 10 of the U.S. Code, which specifically governs the U.S. Armed Forces. That statute explicitly authorizes the U.S. Armed Forces to use any funds appropriated to the Department of Defense to pay for the detention of prisoners of war and other enemy combatants. Specifically, 10 U.S.C. § 956 (2000) authorizes the use of Defense Department funds for "expenses incident to the maintenance, pay, and allowances of prisoners of war" as well as of "other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation." This provision plainly contemplates that the President has the power to detain prisoners of war and other enemy combatants, presumably as an exercise of his constitutional authority as Commander in Chief, notwithstanding the prior enactment of section 4001(a). The language of 10 U.S.C. § 956 is thus difficult to reconcile with section 4001(a) – unless subsection

(a) is construed *not* to interfere with the President's constitutional power to detain enemy combatants. When it enacted 10 U.S.C. § 956, Congress must have understood that the President already had the authority to direct the U.S. Armed Forces to detain prisoners of war, and that the enactment of section 4001(a) had done nothing to undermine that authority.

With the lone exception of the *Padilla* case, *see, e.g., Padilla* Pet. App. 1a-75a, no court has ever construed section 4001(a) to apply to the detention of enemy belligerents in an armed conflict, or to restrict the President's constitutional authority to detain enemy combatants.[16] Moreover, the conclusion that section 4001(a) does not, and should not be construed to, interfere with the President's constitutional authority as Commander in Chief is supported by the well-established canon of construction that statutes are not to be construed in a manner that presents constitutional difficulties, so long as a reasonable alternative construction is available.[17]

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[16] To the contrary, prior to *Padilla*, every other judicial decision interpreting section 4001(a) applied that provision to the federal civilian prison system. *See Howe v. Smith*, 452 U.S. 473, 479 (1981); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978); *Seller v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976); *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir. 1974); *Bono v. Saxbe*, 462 F. Supp. 146, 148 (E.D. Ill. 1978).

[17] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon of construction applies where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800-1 (1992) (citation omitted); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-67 (1989). And in the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986). This Court should not lightly assume Congress has interfered with the President's constitutionally superior position as Chief Executive and Commander in Chief in the areas of foreign affairs and national security, and the Court's consistent view that "'foreign policy [is] the province and responsibility of the Executive.'" *Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Agee*, 453 U.S. at 291. As this Court has repeatedly emphasized, the President's foreign affairs power necessarily exists independently of Congress. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

A review of the legislative history of 18 U.S.C. § 4001(a) underscores the conclusion that Congress never intended that provision to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. While some in Congress questioned the law's scope as potentially infringing on the President's war powers, others assured members that the statute could not extend so far. At best, the legislative history demonstrates that Congress had no fully shared understanding that section 4001 either regulated the President's Commander in Chief authority or did not. The inconclusive nature of the legislative history thus requires this Court to rely upon the scope of the President's war power, the structure of section 4001 and its placement in the U.S. Code, and the canon of avoidance.

First, the 1971 addition of section 4001(a) was accompanied by, and closely identified with, the repeal of the Emergency Detention Act of 1950, ch. 1024, 64 Stat. 1019, 1019-31, *codified at* 50 U.S.C. §§ 811-826, *repealed by* Pub. L. No. 92-128, 85 Stat. 347. That Act authorized the federal government to detain individuals suspected of violating certain *criminal* statutes. Specifically, it empowered the Attorney General "to apprehend and by order detain . . . each person as to whom there is [a] reasonable ground to believe that such person . . . will engage in, or probably will conspire with others to engage in, acts of espionage or . . . sabotage." 64 Stat. 1021. Espionage and sabotage were expressly defined in relation to particular sections of Title 18 of the

United States Code. *Id.* In other words, the Act authorized detention of individuals based on suspected criminal conduct. Thus, the repeal of the 1950 Act, and the accompanying enactment of section 4001(a), addresses similar forms of detention and *not* the detention of enemy combatants.

Second, an earlier version of the legislation enacting section 4001(a) suggests that the provision was not intended to reach the detention of enemy combatants. The original version of the House bill ultimately enacted, H.R. 234, did not include the language "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Instead, it more broadly prohibited the detention of any U.S. citizen "except in conformity with the procedures and the provisions of title 18." H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1437. A Department of Justice witness objected to the language on the ground that the drafters had incorrectly assumed that "all provisions for the detention of convicted persons are contained in title 18." *Id.* The witness went on to list the numerous other federal statutes, outside of title 18, authorizing the confinement of persons convicted of federal crimes.[18] The Committee accepted the witness's objection and recommended an amendment that changed the language to "except pursuant to an Act of Congress." *Id.* Notably, neither the witness nor any member of the Committee ever mentioned expanding the scope of the prohibition beyond detention related to criminal activity. Thus, the change in the legislation occurred in order to recognize other forms of detention of "convicted persons" under the federal criminal laws, and not the preventive detention of enemy combatants that occurs pursuant to the President's Commander in Chief authority.

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[18] *See id.* (citing, among others, provisions dealing with crimes involving narcotics in title 21, Internal Revenue violations in title 26, and crimes involving aircraft hijacking, carrying explosives aboard an aircraft and related crimes in title 49).

Finally, the relevant House floor debate fails to demonstrate a universal, shared understanding of section 4001(a) as an effort to regulate or interfere with the President's Commander in Chief authority to detain enemy combatants. Over a two-day period in September, 1971, the House debated two competing bills: H.R. 234, reported out of the Judiciary Committee, which repealed the Emergency Detention Act and added section 4001(a), and H.R. 820, reported out of the Internal Security Committee, which acted to amend the Emergency Detention Act to prohibit its use "solely on account of race, color, or ancestry." 117 Cong. Rec. at 31754 (1971). The House floor debate reflected the presence of three distinct views of the legislation.

In the first camp, there was wide support for eliminating the possibility of any future use or creation of *civilian* (as opposed to enemy combatant) detention camps. The internment of Japanese-Americans during World War II was frequently invoked by members of Congress to highlight the need for statutory action. Noting that the Emergency Detention Act was not in place during World War II, proponents of H.R. 234 argued that a simple repeal of the Emergency Detention Act would not necessarily eliminate the possibility of future creation or use of civilian detention camps.[19] That concern was the impetus for the addition of the language now found in 18 U.S.C. § 4001(a). Notably, this view does not conflict with our interpretation of section 4001(a), because unlike Hamdi and Padilla today, the Japanese-Americans detained during World War II were held not as enemy combatants, but as civilians.

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[19] *See* 117 Cong. Rec. at 31541 (statement of Rep. Kastenmeier) ("It has been suggested that repeal alone would leave us where we were prior to 1950. The committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress.").

Members of the second camp feared the legislation went too far and violated separation of powers because it infringed upon the President's constitutional powers and duties.[20] These critics suggested that the law's broad language could be read to interfere with the President's power to detain enemy combatants. Importantly, these members did not offer this reading as an authoritative interpretation of the statute's meaning, but rather as an effort to narrow its scope.

Finally, then-Congressman Abner Mikva, responding to both groups, noted that Congress lacked the authority to interfere with the President's constitutional powers, and that H.R. 234 should not be interpreted to do so. He argued:

> If there is any inherent power of the President of the United States, either as the Chief Executive or Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States, nothing in [H.R. 234] interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President.

Id. at 31555.[21] Accordingly, there was no agreement in Congress that section 4001(a) covers enemy combatants.

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[20] *See, e.g.*, 117 Cong. Rec. at 31542 (statement of Rep. Ichord) ("[The amendment] would deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers. . . . Although many Members of this House are committed to the repeal of the Emergency Detention Act of 1950, they have no purpose, I am sure, to confound the President in his exercise of his constitutional duties to defend this Nation, nor would they wish to render this country helpless in the face of its enemies.").

[21] Moments later, Mikva elaborated on this point:

> The next group of opinion would hold that the Federal Government does have certain emergency powers which can be exercised if necessary for self-preservation. Some in this group would give extensive latitude to the President to exercise such war powers, finding the justification in his [powers] as Commander in Chief of the Armed Forces, as well as in his sworn duty to uphold the Constitution and to preserve the Republic. Once again, it is difficult to see how proponents of this view could consistently oppose H.R. 234 on the grounds that it would undercut the President's ability to act in an emergency. After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the Republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress limiting or undercutting an inherent power given by the Constitution or some higher authority. . . . The conclusion to be drawn from all of this is that, historical and philosophical questions aside, the repeal of the Emergency Detention Act which is proposed in H.R. 234 would have no measurable effect on the war powers of the President, whatever those powers are deemed to be at present.

Id. at 31557.

Congress has authorized the current detentions in any event. The Joint Resolution states: "[T]he President is authorized to use all necessary and appropriate force against those . . . persons he determines . . . aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . persons." 115 Stat. 224.[22] As explained,

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[22] *See Bowsher v. Snyar*, 478 U.S. 714, 756 (1986) (finding that a joint resolution satisfies "the full Article I requirements"); *Padilla I*, 233 F. Supp. 2d at 598 (collecting cases that describe a joint resolution as an "Act of Congress").

the power to use force plainly includes the power to detain. We agree with Judge Wesley that a contrary interpretation of the Joint Resolution "requires a strained reading of the plain language of the resolution and cabins the theater of the President's powers as Commander in Chief to foreign soil. If that was the intent of Congress it was masked by the strong and direct language of the Joint Resolution." *Padilla* Pet. App. 74a. This Court should respect the judgment of both political branches and effectuate the plain meaning of the Joint Resolution, and hold that the President has the wartime power to detain enemy combatants.[23]

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit below, and reverse the judgment of the Second Circuit below.

Respectfully submitted.

[23] International law, including the Geneva Conventions of 1949, likewise does not forbid the current detentions. *See, e.g.*, John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207 (2003). The protections of the Geneva Conventions are not self-executing in any event and thus have no legal effect in any federal court. *See Eisentrager*, 339 U.S. at 789 n.14.

JOHN CORNYN
Counsel of Record
Chairman, U.S. Senate
Subcommittee on the
Constitution, Civil Rights
and Property Rights
Dirksen Senate Office Building
Room 139
Washington, DC 20510
(202) 224-7840

Counsel for Amicus Curiae

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v.

DONALD RUMSFELD, *et al.*, Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF RESPONDENTS

JAY ALAN SEKULOW
Counsel of Record
THOMAS P. MONAGHAN
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
JOEL H. THORNTON
JOHN P. TUSKEY
SHANNON D. WOODRUFF
AMERICAN CENTER FOR
LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
(202) 546-8890

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS*[1]

Amicus American Center for Law and Justice (ACLJ) is a public interest law firm committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ attorneys have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States.

The ACLJ is concerned about attempts to subvert the authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the criminal justice system and to the Judiciary. Captured enemy combatants are held in preventive, not punitive, detention as a direct result of their belligerency. Consequently, neither the domestic law of the United States nor the law of war permits captured enemy combatants – whether foreign nationals or United States citizens – to demand that they be tried in the domestic courts of the Detaining Power.

Petitioner Hamdi is not being detained on criminal charges. Instead, having been determined by the President of the United States, acting pursuant to his Constitutional authority as Commander-in-Chief, to be an enemy

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

combatant,[2] Hamdi is being held in military custody (1) to ensure that he cannot rejoin the enemy and participate in any future terrorist activity and (2) to obtain information of intelligence value to thwart such terrorist attacks on targets within the United States. The ACLJ urges this Court to affirm the decision of the Fourth Circuit.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, the United States was brutally attacked by members of the *al-Qaeda*[3] international terrorist organization.[4] *Al-Qaeda* terrorists hijacked four civilian airliners to use as weapons to attack economic and political targets in the United States. Terrorists crashed two airliners into the World Trade Center towers in New York City and a third airliner into the

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[2] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (noting that it is the President who determines whether those who threaten the Nation have "the character of belligerents," and, once that determination is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted").

[3] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*." To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[4] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical – to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, WASH. TIMES, Jan. 26, 2004 ("Rivkin1"), at A19. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do – it projected power." *Id.*

Pentagon in northern Virginia. The fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. Thousands of United States citizens, as well as hundreds of foreign nationals, were killed in the attacks. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United States armed forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghanistan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight, and the global war on terrorism continues unabated.

The present case concerns Petitioner Hamdi's challenge to the legality of his detention by United States armed forces. It is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. Based on intelligence, the executive branch classified him as an enemy combatant and ordered him detained. Hamdi was initially detained in Afghanistan and then Guantanamo Bay. Once it was discovered that he may not have renounced his American citizenship, he was transferred in April 2002 to the Norfolk Naval Station Brig. In furtherance of its intelligence gathering efforts, the United States wanted to continue to detain Petitioner as an enemy combatant "in accordance with the law and customs of war." *Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (4th Cir. 2002) ("*Hamdi II*").

The issues Petitioner raises – *e.g.*, being held without trial, lack of access to counsel, and lack of a set end date for his detention – all sound in domestic criminal law. Domestic criminal law, however, is inapplicable to the Petitioner. Because the United States is in an actual war and because Petitioner was determined by the President, based on available intelligence, to be an enemy combatant, domestic criminal law must yield to the law of war.[5] Nothing in the laws of the United States or the 1949 Geneva Conventions permits captured enemy combatants to challenge the legality of their detention in the courts of the detaining power during wartime.

The Nation's armed forces are actively engaged in military combat operations overseas against an actual enemy. Casualties are occurring on a regular basis. The President must be free to carry out his Constitutional obligations to

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[5] *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (noting that Constitutional war power is "the power to wage war successfully" and that "[w]here . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)) (noting as "obvious and unarguable" that there is no governmental interest more compelling than the Nation's security); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998), at 222, 224-25 (noting that, in wartime, the balance between freedom and order "shifts in favor of the government's ability to deal with conditions that threaten national well-being" and the laws, though not silent, "speak with a somewhat different voice").

defend the Nation. These obligations include detaining United States citizens who, like Petitioner, "associate themselves with the military arm of the enemy government . . . ." *See Ex Parte Quirin*, 317 U.S. 1, 37-38 (1942).

The Constitution reserves the power to determine one's status as an enemy combatant to the Executive branch, and that determination is irrespective of United States citizenship. Even United States citizens, this Court has held, become enemy combatants when they take up arms against the United States:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of the Hague Convention and the law of war.

Ex Parte Quirin, 317 U.S. at 37-38. The President has acted in accordance with his constitutional powers as Chief Executive and Commander in Chief and pursuant to the express authorization of Congress. Because the Constitution assigns to the political branches authority over Petitioner's status as an enemy combatant and the fact of his detention, these matters are beyond the proper reach of the judiciary. Hence, this Court should affirm the Fourth Circuit's ordered dismissal of Petitioners' writ.

ARGUMENT

Petitioners charge that Hamdi's detention without charges,

access to a hearing, or the right to counsel, violates numerous constitutional rights, including the rights to due process of law, to a speedy and public trial, and to counsel. *See* Pet. Brf at 14-21. Yet, Hamdi is not a criminal suspect; rather, he is an enemy combatant captured on the battlefield during the ongoing war on terrorism. His detention is preventive – to ensure that he does not again take up arms against U.S. forces – not punitive.

As will be shown *infra*, the United States is actually "at war" in the sense of our committed military involvement in Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding enemy combatants in United States custody, not the United States domestic criminal justice system. Petitioner Hamdi is being detained as an enemy combatant, not as a criminal suspect. As such, it is the law of war that applies to his detention, not domestic criminal law.

Pursuant to the law of war, enemy combatants – regardless of their nationality – may be detained for the duration of hostilities without being charged with any crimes and without access to counsel to challenge the legality of their detention.

I. THE UNITED STATES IS CURRENTLY ENGAGED IN AN ACTUAL WAR IN WHICH THE ARMED HOSTILITIES ARE ONGOING.

A. Under the Laws of the United States, as Well as International Law, the Nation Is at War.

Following al-Qaeda's unprovoked attacks on the World

Trade Center towers in New York, the Pentagon in Virginia and a fourth hijacked civilian airliner which crashed in Pennsylvania, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[6] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority"); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory"). Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted." *The Prize Cases*, 67 U.S. at 670; *see also In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard

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[6] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, a state of war existed immediately following the 9-11 attacks upon the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. In the Authorization for Use of Military Force, Congress authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding that how Congress gives its consent to engage in war is to be "a discretionary matter for Congress to decide;" "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (concluding that Congress may authorize use of armed force without a formal declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (same).

The judiciary has no authority to decide the political question of whether we are at war. The Fourth Circuit properly refrained from engaging Petitioner's argument that his detention was unlawful because the hostilities have ended: "The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them." *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003) ("*Hamdi III*"). This Court long ago designated

such matters as beyond the judiciary's proper reach: "[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed." *United States v. Three Friends*, 166 U.S. 1, 63 (1897).

The United States military response was not only authorized by United States laws, but international law also recognizes the nation's inherent self defense rights. *See, e.g.*, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). The right of the United States to defend itself was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member also have determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual defense provisions of their respective treaties. In fact, *for the first time in the history of the Alliance*, NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, U.S. allies, and key international bodies all have recognized that the attacks on the United States were acts of war and have responded accordingly.[7] Yet, despite the foregoing, Petitioner Hamdi insists that the courts order that he be released from military custody and be treated as a criminal defendant to receive the myriad rights and protections of the United States criminal justice system. In short, Petitioner is asking this Court to substitute its judgment for the judgment of the Executive and Legislative Branches on a question dealing with national security affairs. *See* discussion at section III, *infra*.

B. Armed Hostilities Trigger Application of the Law of War and Its Rules for Dealing with Belligerents

Part and parcel of any war is the capture and detention of enemy combatants. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. In fact,

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict . . . . [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in U.S. courts.] . . . It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801. . . . Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[8]

Given the existence of armed hostilities and the circumstances of Hamdi's capture, the President acted within his authority in declaring Hamdi to be an enemy combatant and in ordering him to be detained by the armed forces of the United States. *See* GPW, art. 39 (requiring that captured enemy combatants be detained in locations "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power"); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (characterizing "as 'well-established' the power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Fourth Circuit correctly held that "it has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Hamdi II*, 296 F.3d at 283.

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[7] Rivkin1 at A19.

[8] David B. Rivkin, Jr., et al., *The Law and War*, part 2, WASH. TIMES, Jan. 27, 2004 ("Rivkin2"), at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987)).

II. THE PRESIDENT HAS PROPERLY EXERCISED HIS CONSTITUTIONAL WAR POWERS AS WELL AS THOSE EXPRESSLY AUTHORIZED BY CONGRESS

This Court in *Quirin* summarized the President's constitutional war powers:

> The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

Id. at 26.

Following the events of September 11, the President declared a national emergency, 66 Fed. Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution of 1973. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's use of his war powers.[9]

This Court also has set forth the basic principle that it is

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[9] Even though in this case the President's actions were sanctioned by Congress, precedent demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked. *See The Prize Cases*, 67 U.S. 635, 668 (1862) (holding that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected).

the President, as Commander-in-Chief in charge of military affairs, who is to determine enemy status of those who take up arms against the United States. *See The Prize Cases*, 67 U.S. at 670 (holding that during the Civil War, the President alone had the authority to classify southern confederates as enemy belligerents, and the Court must defer to such designations).

Further, as noted above, this Court has held that United States citizens who take up arms against the United States on behalf of a foreign power may also be detained as enemy combatants. *Ex Parte Quirin*, 317 U.S. at 37-38 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war"); *see also In Re Territo*, 156 F.2d 142 (9th Cir. 1946). In *Quirin*, this Court determined that captured Nazi saboteurs, including a United States citizen, were properly declared to be unlawful combatants who could lawfully be tried by Military Commission and executed for their unlawful belligerency. The Court specifically indicated that citizenship in the United States does not grant an enemy belligerent any special rights. 317 U.S. at 37.

In the wake of the tragedy that befell this nation on September 11, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons" . . . "to prevent any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Joint Resolution"). In the ensuing military operation, which is still ongoing, thousands of enemy combatants, including Petitioner, have been captured by American and Allied forces. Therefore, the

analysis should not end with the scope of the President's inherent war powers under Article II, since Congress expressly authorized the President to take the measures Hamdi contests. *See Quirin*, 317 U.S. at 29 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power . . . for here Congress has authorized [his actions]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, *J.*, concurring) ("When the President acts pursuant to an *express* or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") (emphasis added).

18 U.S.C. § 4001(a) does not require a different result. Petitioner argues that The Non-Detention Act, 18 U.S.C. §§ 4001(a), prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. The Fourth Circuit rejected Petitioner's argument under § 4001(a) based on the fact that Congress authorized the detention of enemy combatants when it issued the Joint Resolution. *Hamdi III*, 316 F.3d at 467. The court concluded that detaining enemy combatants was an "inherent part of warfare" and was therefore included in the authorization by Congress. *Id.* Congress must be presumed to have been aware of § 4001(a) when it passed the Joint Resolution and, indeed, because of § 4001(a), was careful to identify a specific group of belligerents. As such, one would be hard pressed to argue that Congress' did not contemplate the possible detention of a terrorist in its passage of the Joint Resolution. If § 4001(a) operates to deny the President the power to detain a U.S. citizen whom the President finds is an enemy combatant with ties to a terrorist organization plotting terrorist acts against the United States, then perhaps it is the constitutionality of § 4001(a) which should be examined.

III. THE PRESIDENT'S DECISIONS REGARDING HAMDI ARE NONJUSTICIABLE POLITICAL QUESTIONS.

"It is well established that the federal courts will not adjudicate political questions." *Powell v. McCormack*, 395 U.S. 486, 518 (1969). "It is the relationship between the Judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question,'" *Baker v. Carr*, 369 U.S. 186, 210 (1962), and the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* "Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding 'political questions,'controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)). Further, "[s]eparation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command." *Id.* at 1402 (citing *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992)).

The separation of powers takes on special significance when the nation itself comes under attack. Thus, foreign policy and military affairs figure prominently among the areas where the political question doctrine has been implicated. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Aktepe*, 105 F.3d at 1403 (finding that political branches are accorded high degree of deference in area of military affairs). Indeed, as explained above, the Constitution commits the conduct of

foreign affairs and national security to the legislative and executive branches of government. *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Johnson*, 339 U.S. at 786.

In *Baker v. Carr*, 396 U.S. 186 (1962), this Court identified six hallmarks of political questions, any one of which is sufficient to carry a controversy beyond justiciable bounds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. As shown *infra*, the issues before this Court independently meet each of the six hallmarks of nonjusticiable political questions, thereby precluding this, or any other, court from granting the relief sought by Petitioners.

A. The Constitution Commits the Issues of Foreign Policy and National Security to the Legislative and Executive Branches.

The Constitution commits the issues raised in this matter

to the political branches of government. Article I, section 8, grants Congress the power to "provide for the common Defence and general Welfare of the United States . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Article III contains no counterpart to the specific powers of war so deliberately enumerated in Articles I and II. This Court has long recognized that "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Thus, one cannot ignore how the Constitution very carefully allocates power during wartime in such a way as to limit the role of the judiciary.

"The Supreme Court has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of our foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); and citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("recognizing 'the generally accepted view that foreign policy is the province and responsibility of the Executive'") (citation omitted)); *see also Haig*, 453 U.S. at 307 (concluding that foreign policy and national security overlap and "cannot neatly be compartmentalized"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . .

'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" (quoting 6 Annals of Congress 613 (1816)); *Oetjen*, 246 U.S. at 302 (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who "determine[s] what degree of force the crisis demands" as well as whether those who threaten the Nation have "the character of belligerents").

The President also has broad authority as Commander-in-Chief. As this Court noted in *Hirabayashi*:

> The war power of the national government is "the power to wage war successfully. . . ." *It extends to every matter and activity so related to war as substantially to affect its conduct and progress*. . . . It embraces every phase of the national defense. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them *wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means of resisting it*. . . . Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93 (internal citations omitted) (emphasis added).

The underlying events in this matter stem from the United States' response to the 9-11 terrorist attacks perpetrated on our soil. The United States' response involves both foreign policy and national security components. Militarily, the President, with the explicit approval of the Congress, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . ."), ordered the armed forces of the United States into action to seek out and destroy the terrorists and those who succor them. This led to active hostilities in Afghanistan aimed at destroying the *al-Qaeda* terrorist organization and the Taliban regime which gave the terrorists safe haven.

Since hostilities began, United States agencies and armed forces have been identifying, capturing, and taking into custody members of the Taliban, the *al-Qaeda* terrorist organization, and their supporters – including Petitioner Hamdi. Due to the demonstrated suicidal nature of the 9-11 terrorist acts and the *kamikaze* philosophy that motivates many of the captured enemy combatants,[10] the President has determined that special security measures must be used to detain them. Such decisions are political decisions which implicate both the national security and foreign policies of the United States, whose execution rightly resides in the political branches. The Judiciary is ill-equipped to determine the

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[10] *See, e.g.*, www.latimes.com/news/nationworld/world/la-092401alqaeda.story ("[*Al-Qaeda* members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States").

possible impact of such decisions on the wartime foreign and national security policies of the Nation and should be wary of entering the realm of discretionary decision-making reserved to the President. *See Johnson*, 339 U.S. at 786 (characterizing "as 'well-established' the power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The President's determination that Hamdi was an enemy combatant subject to detention under the law of war was his, not a court's, decision to make.

B. This Matter Lacks Judicially Discoverable and Manageable Standards.

No judicially discoverable and manageable standards exist for resolving the questions raised by the detention of the extremely dangerous enemy combatants in the war on terrorism. Decisions about prosecuting a war and dealing with captives must often be made on an *ad hoc* basis, depending on unique, often unpredictable, circumstances. The day-to-day prosecution of war and decisions related directly to that decision, such as the status and care of captured enemy combatants, rightly reside with the President in his capacity as Commander-in-Chief. *See, e.g., Hamilton v. Kentucky Distilleries & Whiskey Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power "to remedy the evils which have arisen from [a conflict's] rise and progress") (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870)); *In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced.") (citing *Stewart*, 78 U.S. at 507). Given the unique events of 9-11 and the unique nature of the war on terrorism, the President

deserves the latitude and benefit of the doubt as he seeks to grapple with a heretofore unknown situation and to develop effective policies to restore peace.[11] These decisions are discretionary judgment calls. Nothing in the Constitution exists to guide a judicial examination of the President's exercise of that judgment.

Due to the unique nature of the war on terrorism, the President must be able to make informed judgments about how best to deal with captives. Unlike in previous conflicts, many of the detainees in this conflict appear to possess a mindset bent on carrying out suicidal attacks on Americans. This mindset makes the handling of captives particularly dangerous and calls for special security measures and extreme caution. Such policy decisions are for the President and Congress to make, not the courts. Not only are members of the terrorist network especially dangerous (since they can "hide" in plain view in American society), but such persons, when apprehended, may be treasure troves of vital intelligence information needed by the President to thwart other terrorist attacks. As such, detaining such persons as enemy combatants under the law of war better serves the security interests of the United States than trying them for violations of the United States criminal code.[12] Such policy

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[11] *See* www.whitehouse.gov/news/releases/2001/09/20010913-12.html (When asked whether there can be a war without a formal enemy, White House Press Secretary Ari Fleischer replied: "[A]s the President has indicated, this is a different type of enemy in the 21st century. The President said, this enemy is nameless; this enemy is faceless; this enemy has no specific borders. . . . It is a different type of enemy. . . .").

[12] This is not to say that criminal charges cannot be brought; however, during war, there are valid reasons to refrain from prosecuting such an individual criminally and, instead, to detain him in accordance with the law of war. Such reasons include ensuring that he does not rejoin the

decisions rightly reside with the President as Commander-in-Chief, not with the courts. Moreover, the President and the Congress are in agreement here. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Further,

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of the political power not subject to judicial intrusion or inquiry.*

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (citing *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *Curtiss-Wright*, 299 U.S. at 319-21; *Oetjen*, 246 U.S. at 302) (emphasis added).

C. It Is Impossible to Decide This Matter Without an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism, and this Court has noted as "obvious and unarguable" that there is no governmental interest more compelling than the Nation's security. *Haig*, 453 U.S. at 307 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *accord Cole v. Young*, 351 U.S. 536, 546 (1956).

The Fourth Circuit identified the practical reality beneath the deference which courts historically have shown to the political branches when dealing with sensitive matters of foreign policy, national security, or military affairs:

> Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the war-making powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.

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fight for the duration of hostilities and gathering intelligence. In such situations, the decision as to what to do with such an individual is a political decision to be made by the President without second-guessing by the courts. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs").

Hamdi III, 316 F.3d at 463. This Court has echoed the need for "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

Just the issue of what to do with enemy combatants who may fall into United States hands is a political question which implicates a whole host of matters. For example, once United States forces have taken enemy combatants into custody, they must ensure that such persons are no longer able to take up arms against U.S. forces or harm their captors, that perpetrators of war crimes are properly identified and punished, and that information of intelligence value is timely obtained.

Enemy belligerents are detained, not based on probable cause or other important domestic constitutional principles, but because of their armed belligerency, capture, and continuing threat to American interests. *Their detention, therefore, is preventive rather than punitive*. As mentioned earlier, *al-Qaeda* captives present an additional dynamic – their willingness to be suicidally aggressive. This makes them especially dangerous because they may kill without compunction or hesitation. As such, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility to formulate and implement policies to protect and defend the United States. He both needs and deserves the latitude to develop such policies without undue interference by an overreaching Judiciary.

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin Organization of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C.Cir. 1999) (quoting *Chicago & Southern*, 333 U.S. at 111). The same is true for military decisions. *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

Petitioner Hamdi was captured on the battlefield in Afghanistan. The President, as Commander-in-Chief, has determined that it is more important to national security to place him in preventive custody pursuant to the law of war than to punish him for any criminal acts. That is a political determination. This Court should not lightly intrude on the executive function of waging war. As the Fourth Circuit cautioned, "[f]or the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical." *Hamdi III*, 316 F.3d at 463.

D. It Would Be Impossible to Undertake Independent Resolution Without Expressing Lack of Respect Due Coordinate Branches of Government.

Adjudicating this matter would express a lack of respect for the political branches of government by subjecting their

discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the Judiciary's relative lack of expertise in such areas. Detaining enemy combatants is a political matter, and allowing enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power would undoubtedly handicap the relevant military operations being conducted. Moreover, subjecting the war making decisions of the political branches to judicial oversight would constitute "a conflict between judicial and military opinion highly comforting to enemies of the United States." *Johnson*, 339 U.S. at 778-79. Requiring the President to obtain judicial assent to his actions in a time of war renders the separation of powers a nullity. *See Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

For example, the circumstances and rationale behind Petitioner Hamdi's detention are set forth in an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs ("the Mobbs Declaration"). According to the Mobbs Declaration, the military determined that Petitioner had traveled to Afghanistan in July or August of 2001 where he became affiliated with a Taliban military unit and received weapons training. After September 11, 2001, Petitioner was captured when his Taliban unit surrendered to Northern Alliance forces with whom it had been fighting. Included in the Mobbs Declaration was the fact that Hamdi was in possession of an AK-47 rifle at the time of his surrender. To evaluate this recitation of the rationale for detaining Petitioner in military custody as an

enemy combatant, a court would have to substitute its opinion for that of the military and the President.

E. There Is a Need For Unquestioning Adherence to the Political Decision Already Made by the President.

The situation faced by the United States today is without historical precedent. The United States has suffered well-planned, coordinated attacks on the political and economic centers of this Nation. The President, with Congress' explicit concurrence, has taken decisive steps to meet the threat and protect the Nation. Such steps should not be subjected to second-guessing by the Judiciary. *See Haig*, 453 U.S. at 307 (concluding it to be "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation) (citing *Aptheker*, 378 U.S. at 509); *accord Cole*, 351 U.S. at 546; *Hirabayashi*, 320 U.S. at 93 (nation's war power is "the power to wage war successfully").

We are facing an enemy who willingly commits the most horrendous, suicidal acts against innocent civilians and who is actively seeking out the opportunity to do so again. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat. Any appearance of official opposition by the judiciary to the President's war policies will surely demoralize the men and women in the U.S. armed forces who are daily putting their lives at risk to ensure that those policies are implemented.

In this case, the President is acting pursuant to his

authority as Chief Executive, *see The Prize Cases*, 67 U.S. at 668 ("The Constitution confers on the President the whole Executive power."); as Commander-in-Chief, U.S. CONST. art. II, § 2, cl. 1; and with statutory authority granted by the Congress. Pub. L. No. 107-40, 115 Stat. 224 (2001). Moreover,

> [w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. *In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation. . . ."*

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)) (emphasis added). Given this conciliation between the President and the Congress, this Court should defer to the President's decision regarding Petitioner Hamdi's detention.

F. There Is Potential For Embarrassment From Multifarious Pronouncements by Various Departments on One Question.

The President as Chief Executive of the United States and Commander-in-Chief of its armed forces is responsible for a whole host of decisions concerning the building of coalitions and prosecution of the war on terrorism. One such decision is how to treat enemy belligerents taken captive by United States armed forces. This issue is especially important given the nature of the war and the fact that nationals from countries friendly to the United States are numbered among the enemy combatants being detained by the United States. The issue of the fair and equal treatment of enemy combatants detained by

the United States in the war on terrorism is an important and emotional issue for many nations. The President must have the discretion to deal with United States citizens who have taken up arms against the United States in the same way he deals with captured enemy combatants from other nations.

Because of the unique nature of this war and the need to maintain coalitions with a broad array of foreign governments, it is necessary for the Nation to speak with one voice. *See, e.g., Baker*, 369 U.S. at 211 (recognizing the special importance of our nation speaking with one voice in the field of foreign affairs). It is the Executive who has been given the responsibility to speak for the Nation as a whole, and, given the high stakes involved, the Judiciary must tread lightly so as to avoid undermining the President's ability to successfully prosecute the ongoing war. It is the President who must determine the risks and benefits of national policy, not the courts, and it is in times of grave national crisis and danger that the courts must defer to the elected leaders to craft appropriate policies in the Nation's interest. This is such a time. This Court should not substitute its judgment for that of the military and the President.

CONCLUSION

Hamdi's detention is pursuant to the President's well-established authority to detain an enemy combatant during wartime. *Quirin*, 317 U.S. at 37-38. In addition, Hamdi's conduct was well within the threat identified in the Joint Resolution. Under the Constitution's allocation of war powers, neither Petitioner's status as an enemy combatant, nor the fact of his detention are subject to judicial scrutiny. As the Fourth Circuit explained, "Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme."

Hamdi III, 316 F.3d at 477. To use Justice Goldberg's oft-quoted phrase, the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).

For the foregoing reasons, *amicus* American Center for Law and Justice urges this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JAY ALAN SEKULOW
(Counsel of Record)
THOMAS P. MONAGHAN
STUART J. ROTH
JAMES M. HENDERSON, SR.
COLBY M. MAY
JOEL H. THORNTON
JOHN P. TUSKEY
SHANNON D. WOODRUFF
AMERICAN CENTER FOR
LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
(202) 546-8890
(202) 546-9309 (FAX)

Attorneys for Amicus Curiae

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IN THE

Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS NEXT FRIEND OF YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CENTER FOR AMERICAN UNITY, FRIENDS OF IMMIGRATION LAW ENFORCEMENT, NATIONAL CENTER ON CITIZENSHIP AND IMMIGRATION, AND REPRESENTATIVES STEVE KING, DANA ROHRABACHER, LAMAR S. SMITH, THOMAS G. TANCREDO, ROSCOE BARTLETT, MAC COLLINS, JOE BARTON, AND JOHN J. DUNCAN, JR. AS *AMICI CURIAE* SUPPORTING AFFIRMANCE

BARNABY W. ZALL
Counsel of Record for Amici
Weinberg & Jacobs, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 468-5500

March 25, 2004

QUESTIONS PRESENTED

Note: *Amici curiae* respectfully suggest that the Questions presented fairly include the following question:

Whether a person, born in the United States of alien parents in this country on a temporary work visa, who leaves the United States as an infant, never returns, declares himself a citizen of another country, and takes up arms in a conflict against forces of the United States, and otherwise demonstrates no allegiance to the United States and demonstrates allegiance to foreign powers, was ever "subject to the jurisdiction" of the United States under the Fourteenth Amendment's Citizenship Clause.

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INTEREST OF AMICI CURIAE

Amici wish to address a topic overlooked by all parties: whether Petitioner Yaser Esam Hamdi is, in fact, a United States citizen under the Citizenship Clause of the Fourteenth Amendment to the Constitution. Counsel for all parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.[1]

The Center for American Unity is a national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century. www.cfau.org. CAU conducts research and monitors developments on a broad range of economic, domestic, defense and foreign policy issues related to the social, historical and political matters of the American nation-state. CAU filed a brief *amici curiae* in *Alexander v. Sandoval,* No. 99-1908 (brief of CAU, 14 Members of Congress and two other organizations).

Friends of Immigration Law Enforcement (FILE) is a national group of attorneys, law enforcement officers, legislators, and others, who work to re-establish the rule of law in the area of immigration to the United States. *See* www.fileus.org. FILE also arranges legal help for Americans who have been victimized or injured by the federal government's failure to enforce immigration law and publishes position papers on various aspects of immigration. FILE filed a motion to intervene in this case in the court below, but no action was taken on its motion.

The National Center for Citizenship and Immigration is a national, nonprofit organization whose mission is to educate the

[1]Pursuant to Rule 37.6, *amici* certify that no person or entity other than *amici* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

American people regarding the principles of American citizenship and sound immigration policy in order to bring about a better public understanding of the issues and choices facing the nation due to open borders and unworkable immigration policies and practices. www.ncciamerica.org.

Steve King is a Member of Congress, representing the Fifth Congressional District of Iowa, and is a member of the House Judiciary Committee and the Constitution and Immigration Subcommittees. Dana Rohrabacher is a Member of Congress, representing the 46th District of California, and was the principal spokesman for California's Proposition 187, a successful ballot initiative to deny social services to illegal immigrants, which was later struck down on the basis of the erroneous interpretation of the Citizenship Clause of Fourteenth Amendment discussed in this brief. *See*, P. 23 *infra*. Lamar Smith is a Member of Congress, representing the 21st District of Texas, and is a Member of the Judiciary Committee and the Immigration Subcommittee. Thomas G. Tancredo is a Member of Congress, representing the Sixth District of Colorado, and is the Chair of the Congressional Immigration Reform Caucus. Roscoe Bartlett is a Member of Congress, representing the Sixth District of Maryland. Michael "Mac" Collins is a Member of Congress, representing the Eighth District of Georgia, and is Deputy Majority Whip of the House. Joe L. Barton is a Member of Congress, representing the Sixth District of Texas, and is Chairman of the House Committee on Energy and Commerce. John J. Duncan, Jr., is a Member of Congress, representing the Second District of Tennessee, and is a former state court judge.

Amici believe that this Court's recent decisions have weakened or ignored the jurisdictional requirement in the Citizenship Clause of the Fourteenth Amendment ("and subject to the jurisdiction thereof"). *Amici* respectfully request this Court to avoid further weakening or ignoring the jurisdictional

requirement in the Citizenship Clause in any decision in this case.

PRELIMINARY STATEMENT

Petitioner Yaser Esam Hamdi ("Hamdi") was apparently born on September 26, 1980, at Womens' Hospital in the Parish of East Baton Rouge, Louisiana to Petitioner Esam Fouad Hamdi and to Nadiah Hussen Fattah, both Saudi citizens.[2] Esam Hamdi worked as a chemical engineer for Saudi Arabia Basic Industries, Inc. The Hamdis were in the United States on some form of temporary work visas, and left when Hamdi was still an infant. Hamdi apparently never returned to the United States.

When questioned after his capture on the battlefields of Afghanistan, Hamdi told his interrogators that he was a Saudi citizen. Affidavit of Special Adviser Michael Mobbs ("Mobbs Decl."), J.A. 61, ¶ 5 (Hamdi identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States.").

Although Petitioners flatly assert that Hamdi is a citizen, Brief for Petitioners, 4 ("Hamdi is an American citizen by birth. J.A. 10-11."), the Government notes only that Hamdi is "a presumed citizen." Brief for Respondents in Opposition to Petition, I, 5 n. 4 ("a presumed American citizen such as Hamdi"). Hamdi apparently was born in the United States, but beyond the accident of birth, his circumstances do not seem to satisfy the phrase "and subject to the jurisdiction thereof" in the Citizenship Clause of Section 1 of the Fourteenth Amendment (hereinafter "the jurisdiction requirement").

As discussed in more detail below, this Court's comments and decisions on the jurisdiction requirement in

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[2]Louisiana Certificate of Live Birth 117-1980-058-00393

recent years have exacerbated the problem of illegal immigration to this country. In some areas, a huge percentage of births are to illegal immigrants.[3]

Yet the problem is not confined to illegal immigration. Thousands of pregnant women legally come to the United States each year just to give birth.[4] These aliens have no ties or allegiance to the United States. "Indeed, most are eager to fly home as soon as they can get the birth certificates and passports for their newborns." Barbara Demick, "The Baby Registry of Choice," *The Los Angeles Times*, May 25, 2002, A-1, Col. 1 (most common reason for desiring American birth is to avoid mandatory Korean military service).

This process might be termed "drive-by citizenship," and it is a large and growing problem for the United States: "Thousands of pregnant South Koreans travel to the U.S. to give birth to American citizens. A mini-industry has been created to serve them. . . . 'From birth to citizenship,' advertises one Korean-language Web site (www.birthinusa.com) that helps women give birth in Los Angeles." *Id.*

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[3]Sarah Adams, "The Basic Right of Citizenship: A Comparative Study," Center for Immigration Studies, Sept. 1993, www.cis.org/articles/1993/back793.html (citing Los Angeles County Supervisor Mike Antonovich that two-thirds of all live births in Los Angeles County hospitals are to illegal aliens)

[4]Prabhat K. Mukherjee, "Thoughts of the Times: American Dream," *The Korea Times*, December 1, 2003, http://times.hankooki.com/cgi-bin/hkiprn.cgi?pa=/lpage/opinion/200312/kt2003120119273511390.htm&ur=times.hankooki.com&fo=print_kt.htm Nancy Cleeland, "Born in the USA: Births to Illegal Immigrants on the Rise," *San Diego Union-Tribune*, Feb. 20, 1994, http://members.lycos.co.uk/lamigra/NEWS/AnchorBabies940220SDUT.html

If an alien who is present in the United States for mere moments during birth can impart citizenship, the jurisdiction requirement ceases to have effective meaning. "Drive-by citizenship" conflicts with the concept of citizenship envisioned by the drafters of the Fourteenth Amendment, and poses significant challenges to the United States.

While earlier decisions of this Court reflected that dilemma by seriously considering the jurisdiction requirement, in recent years this Court's decisions have effectively nullified the jurisdiction requirement. This case shows the reach of that nullification.

In the present case, a person with no allegiance to the United States is "presumed" or declared to be a citizen "by birth." Pet. Br. 4. Yet, to come within the jurisdiction requirement, it is not enough that Hamdi was born in Louisiana. He must also show that he was "subject to the jurisdiction" of the United States, as that phrase (the jurisdiction requirement) was meant in the Fourteenth Amendment.

Petitioners themselves note the distinction between citizen and aliens in their opening brief: "The Court therefore has taken pains to distinguish between citizens and enemy aliens in the context of the war powers." Pet. Br. 33. Petitioners cite *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) for the principle that "the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Id.*

Oddly, Petitioners note no irony in the fact that Hamdi himself has absolutely no such association with the American polity. He never had such an association.

Petitioners' residence was ephemeral, and neither Hamdi nor his parents demonstrated allegiance to the United

States in any way. Hamdi left the United States as an infant, never returned, declared himself a citizen of Saudi Arabia, and engaged in a conflict against the United States and its allied forces. His actions are inconsistent with any allegiance to the United States. His actions clearly reject being "subject to the jurisdiction" of the United States.

If the United States is ever to confront issues raised by "drive-by citizenship," the decision of this Court in this case should not further complicate or expand the issues presented by the jurisdiction requirement. This brief asks whether, in light of these circumstances, the Court should deem Hamdi a citizen. Was he ever, asks this brief, "subject to the jurisdiction" of the United States? This brief also asks the Court to respect the jurisdiction requirement of the Citizenship Clause – in its original intention of requiring some allegiance to the United States – or at least, not to further weaken or ignore it in any decision in this case.

SUMMARY OF ARGUMENT

The Citizenship Clause of the Fourteenth Amendment was added during Senate debate. During the debate, the authors discussed in great detail their purpose and intentions in adding the requirement that a person be born, not just in the United States, but "subject to the jurisdiction thereof." Sen. Howard, sponsor and author of the Citizenship Clause, when questioned about the meaning of "jurisdiction," responded that the phrase was intended to be read as meaning "not owing allegiance to anybody else." Sen. Trumbull, Chairman of the Judiciary Committee, described persons who "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." Chairman Trumbull noted that even "partial allegiance if you please, to some other government" is

sufficient to disqualify a person under the jurisdiction requirement.

For three decades following the adoption of the Fourteenth Amendment, this Court recognized the jurisdiction requirement of the Citizenship Clause as including a non-geographical distinction between those with allegiance and those without. In *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873), this Court noted that the jurisdiction clause was "intended to exclude from its operation . . . citizens or subjects of foreign states born within the United States." In *Elk v. Wilkins*, 112 U.S. 94, 101 (1884), the Court described the jurisdiction clause as covering "all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power."

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), however, Justice Gray wrote an opinion which eviscerated the jurisdiction requirement. Justice Gray felt that, once within a national territory, an alien gives up allegiance to all other governments, at least temporarily. 169 U.S. at 693 (alien's "allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory."). Thus, any alien born within the United States would automatically gain citizenship without reference to the jurisdiction requirement.

Yet this analysis of allegiance is foreign to American history, earlier precedent and logic. Under that analysis, for example, there would be no need to require aliens to take an oath of naturalization renouncing all allegiances to foreign powers. Similarly, the naturalization cases continue to require some type of "talisman of dedicated attachment" on the part of an applicant for citizenship. *Rogers v. Bellei,* 401 U.S. 815, 834 (1971).

Unfortunately, Justice Gray's faulty analysis of the jurisdiction requirement was cited in later decisions for the proposition that a child of alien parents "born in the United States, was a citizen of this country," without further analysis. *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985). In fact, in *Plyler v. Doe*, 457 U.S. 202, 211 (1982), the Court went further, suggesting that the authors of the Citizenship Clause used the term "jurisdiction" in a "predominantly geographic sense." Again, the *Plyler* opinion included no reference to or use of any allegiance analysis, even though the authors had made such an analysis central to the Citizenship Clause. The evisceration of the jurisdiction requirement creates a powerful magnet for "drive-by citizenship."

The jurisdiction requirement should be applied in this case. Hamdi has no allegiance or attachment to the United States. His is a classic case of "drive-by citizenship." His and his parents' residence was temporary. They remained at all times subjects of the Saudi government. Neither Hamdi nor his parents ever demonstrated any intention of remaining in the United States (and under the terms of their temporary visas, they could not have). They never acted in a manner consistent with the "association with the polity" which Petitioners themselves cite as a requisite of citizenship. Pet. Br. 33, *citing Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

How, in these circumstances, can Hamdi claim the same citizenship rights as a person born "subject to the complete jurisdiction" of the United States? Hamdi is in the same position as John Elk, the Native American denied citizenship in an opinion by Justice Gray for the Court in *Elk v. Wilkins*. He may have been born within the territory of the United States, but he shows no "talismans of dedicated attachment" to this country.

The Court should apply the jurisdiction requirement in its intended form – including an allegiance requirement – and determine whether Petitioner Hamdi is, in fact, "an American citizen by birth."

ARGUMENT

I. The Jurisdiction Requirement in the First Sentence of Section One of the Fourteenth Amendment Means Something More Than Just Geography of Birth:

The jurisdiction requirement of Section One of the Fourteenth Amendment must mean something. The jurisdiction requirement was added to the draft of the Fourteenth Amendment by the Senate after a lengthy and acrimonious debate. CONGRESSIONAL GLOBE, May 30, 1866, 39th Congress, 1st Session, pp. 2890-97. Both contemporary jurisprudence and the authors' expressed statements indicate that the jurisdiction requirement was to include some indication of allegiance to the country in addition to the geography of birth. As a later case described it in the context of naturalization, the Founders sought some "talisman of dedicated attachment." *Rogers v. Bellei*, 401 U.S. 815, 834 (1971), *citing*, *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927).

A. Allegiance to the United States Was Important to the Authors of the Fourteenth Amendment:

As early as the Act of Jan. 29, 1795 (1 Stat. 414, c. 20), applicants for naturalization to the new United States were required to absolutely renounce and abjure all allegiance to every foreign prince or state, and to support the Constitution. The English common law theory of absolute and perpetual allegiance to the Crown from birth was rejected. 8 Ops. Atty

Gen. 139 (1856), 9 Ops. Atty Gen. 356 (1859). Citizenship thus required some demonstration of allegiance to the United States.

The drafters of the Fourteenth Amendment, and the earlier Civil Rights Act of 1866 (14 Stat. 27, c. 31), were well aware of this difference between the old English system of permanent allegiance by birth and the new American system of some form of allegiance by choice and consent. "It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power." CONGRESSIONAL GLOBE, *supra*, 2890 (Sen. Cowan).

On May 30, 1866, on the floor of the Senate, Senator Jacob Merritt Howard of Michigan proposed an amendment to the Fourteenth Amendment resolution passed by the House of Representatives. *Id.*, 2890. The amendment, ultimately enacted without change as the first sentence of Section One of the Fourteenth Amendment, read: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." *Id.*

Sen. Howard said that "this will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[5] *Id.*

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[5]Much confusion might have been avoided if it were clear whether Sen. Howard was speaking of different groups ("who are foreigners, aliens" OR "who belong to the families of ambassadors"). As discussed *infra*, the shift in this Court's decisions in 1898 was whether the jurisdiction requirement would be limited only to three enumerated groups – including children of diplomats – or was intended to cover the children of "foreigners, aliens" more generally. *Compare, e.g., The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (jurisdiction requirement was "intended to exclude from its operation children of

(continued...)

Sen. James Doolittle of Wisconsin proposed an amendment to Howard's amendment to add language to exclude "Indians not taxed." *Id.* Sen. Edgar Cowan of Pennsylvania asked questions about the definition of citizen:

> If [the children of Chinese immigrants in California and Gypsies in Pennsylvania are citizens], what rights do they have? **Have they more rights than a sojourner in the United States?** If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. . . . He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word."

Id. (Emphasis added).

Sen. Cowan noted that he had been unable to get answers to his questions, either from his discussions about the Fourteenth Amendment, or from decisions of the Supreme Court. *Id.* Cowan read prior law as permitting States to describe certain rights of "aliens and others who acknowledge no allegiance, either to the State or the General Government."*Id.* Cowan asked for clarification of rights: "Or is it only that he is entitled as a sojourner to the protection of the laws while he is within and under the jurisdiction of the courts?" *Id.*, 2891.

Sen. John Conness of California, himself an immigrant from Ireland, responded to Sen. Cowan's questions by declaring that his intention was to "declare children of all parentage

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[5](...continued)
ministers, consuls, **and** citizens or subjects of foreign states born within the United States"; emphasis added) and *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898) ("it can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides.").

whatever, born in California, should be regarded as citizens of the United States." *Id.* There followed discussion of the need for language excluding "Indians not taxed" from the language.

Finally, Sen. Lyman Trumbull of Illinois, the Chairman of the Judiciary Committee and a member of the Committee of Fifteen which drafted the Fourteenth Amendment, stepped forward to explain the jurisdiction requirement:

> The provision is, that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens.' That means 'subject to the complete jurisdiction thereof.' . . . What do we mean by 'subject to the jurisdiction of the United States?' **Not owing allegiance to anybody else**. That is what it means. Can you sue a Navajoe [*sic*] Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them."

Id. (emphasis added).

Chairman Trumbull continued: "It cannot be said of any Indian **who owes allegiance, partial allegiance if you please, to some other government that he is 'subject to the jurisdiction of the United States**.'" *Id.* (emphasis added). Trumbull thought Sen. Doolittle's amendment regarding "Indians not taxed" was unnecessary. *Id.*

Sen. Reverdy Johnson of Maryland, the lone Democrat participating in the debate, then spoke up to support Doolittle's amendment as a clarification. "Now all this amendment provides is, that all persons born in the United States **and not subject to some foreign Power** – for that, no doubt, is the meaning of the committee who have brought the matter before – shall be considered as citizens of the United States." *Id.* (emphasis added). Johnson suggested that Doolittle's

amendment would do no harm if it were adopted, *id.*, and pointed out that the language of the recently-passed civil rights bill had "the same provision"[6] in it. *Id.*, 2894.

> I read now from the civil rights bill as it passed: 'That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens.' What did these words mean? They meant something; and their meaning as they are inserted in that act is the same meaning which will be given to them if they are inserted in the first section of this constitutional amendment.

Id.

In further remarks, Chairman Trumbull repeated his description of "Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of **owing allegiance solely to the United States**." *Id.* (emphasis added). Reminded that Supreme Court decisions treated Indians as "subjects" and not as citizens, Trumbull replied: "In some sense they are regarded as within the territorial boundaries of the United States, but I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here." *Id.*

After more discussion, Sen. Howard, the author of the original amendment, said:

> I concur entirely with the honorable Senator from Illinois, in holding that the word 'jurisdiction,' as

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[6]This uncontradicted and repeated statement that the phrases in the Civil Rights Act and the jurisdiction requirement were intended to have the same effect was ignored in *Wong Kim Ark*, 169 U.S. at 688 ("the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.'").

here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, ... that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

Id.

Sen. Howard summed up the debate by saying:

> In one sense, all persons born within the geographical limits of the United states are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect; and so with these Indians. . . . I understand the words here 'subject to the jurisdiction of the United States,' to mean fully and completely subject to the jurisdiction of the United States.

Id., 2897.

The Senate then rejected Sen. Doolittle's amendment on Indians by a recorded vote, and passed the amendment to the proposed Fourteenth Amendment on a voice vote. *Id.*

Certain lessons can be drawn from this debate. The authors of the Fourteenth Amendment did not want to grant citizenship to every person born in the United States. They wanted to grant citizenship only to persons born here who were also "subject to the jurisdiction" of the United States. They understood that phrase to be the same as the phrase "and not subject to any foreign Power," used in the recent civil rights

bill. And by "subject to the jurisdiction," they meant "subject to the jurisdiction of the United States in every sense," and "[n]ot owing allegiance to anybody else." Even "partial allegiance" was sufficient to demonstrate that a person was not subject to the "complete jurisdiction" of the United States.

The authors made a distinction between those within the jurisdiction of the United States and "a sojourner in the United States," or "a traveler [who] comes here from Ethiopia, from Australia, or from Great Britain." In other words, the authors of the jurisdiction requirement were concerned about "drive-by citizenship" and thought that the jurisdiction requirement would exclude persons who had even a "partial allegiance" to another government.

B. This Court's Initial Applications of the Jurisdiction Requirement Reflected the Authors' Intentions:

For three decades following the Senate debate noted above, this Court recognized the jurisdiction requirement as including a non-geographical distinction between those with allegiance and those without. In *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court noted that the phrase "subject to the jurisdiction thereof" was "intended to exclude from its operation children of ministers, consuls, **and citizens or subjects of foreign states born within the United States.**" 83 U.S. at 73 (emphasis added).

In *Minor v. Happersett*, 88 U.S. 162 (1874), the Court said:

> At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners.

> Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. **As to this class there have been doubts**, but never as to the first.

88 U.S. at 167-68 (emphasis added).

In *Elk v. Wilkins*, 112 U.S. 94 (1884), Justice Gray, for the Court, described the jurisdiction requirement as intended "to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and **owing no allegiance to any alien power**, should be citizens of the United States." 112 U.S. at 101 (emphasis added). Justice Gray continued: "The evident meaning of these last words ["subject to the jurisdiction thereof"] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." 112 U.S. at 102.

This Court should not, in any decision in this case, ignore or undermine this clear intent by suggesting that geography is the sole determinant of citizenship. The Court should find meaning in the jurisdiction requirement.

II. Some of This Court's More Recent Interpretations of the Jurisdiction Requirement Are Inconsistent With American History, Earlier Precedent and the Explicit Intention of the Authors of the Jurisdiction Requirement:

Unfortunately, some of this Court's more recent precedents don't reflect the authors' intentions, as expressed in the debate described above. In fact, some of this Court's rulings appear to contradict the authors' intentions, and make assertions directly opposite to those expressed in the debate.

The most extensive – and problematic – discussion of the jurisdiction requirement is in *United States v. Wong Kim*

Ark, 169 U.S. 649 (1898). In *Wong*, the Court considered whether:

> "a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but **have a permanent domicil and residence in the United States**, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution."

169 U.S. at 653 (emphasis added). The Court, in an opinion by Justice Gray, held that the child does become a citizen. 169 U.S. at 705.

This result is consistent with the Senate debate discussed above. As Justice Gray noted in passing, during the Senate debates on both the civil rights act and the jurisdiction requirement in the Fourteenth Amendment, the question of the American-born children of Chinese immigrants was explicitly discussed and the expressed intention was that these children would be citizens. 169 U.S. at 697-99, *citing* CONGRESSIONAL GLOBE, *supra*, pp. 498, 573, 574, 2890-92.

A. Justice Gray's Analysis in Wong Kim Ark Conflicts With the Authors' Intentions, This Court's Other Decisions, and Logic:

Justice Gray's reasoning, however, was inconsistent with earlier decisions of this Court, and the intentions expressed clearly in the Senate debate quoted above. Justice Gray's analysis in *Wong* asserts a different understanding of "allegiance" – the crux of both his and the authors' understanding of "jurisdiction."

To Justice Gray, in *Wong*, once within a national territory, an alien gives up all allegiance to all other governments, at least temporarily. Given the importance the authors placed on allegiance, this belief is crucial to understanding the elemental contradiction between Justice Gray's reasoning and that of the authors of the jurisdiction requirement.

Justice Gray said that an alien's "allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory. . ." 169 U.S. at 693. This, to Justice Gray, was "complete" jurisdiction: "it can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides." 169 U.S. at 694.

Justice Gray's belief in an alien's allegiance shifting in such a total and complete manner simply upon entry to the United States, however, is foreign to American history, this Court's earlier precedents, and logic. Under Justice Gray's analysis, for example, there would be no reason to require aliens to take an oath of naturalization renouncing all allegiances to foreign princes or powers, as had been required since 1795, and continues today. "I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty. . ." 8 U.S.C. § 1448(a)(1) (2001); U.S. Dept. Of Homeland Sec., Oath of Naturalization, http://uscis.gov/graphics/aboutus/history/teacher/oath.htm.

The authors of the jurisdiction requirement apparently believed in a different definition of "complete" jurisdiction and "allegiance." For example, Indians were thought to be within the territory of the United States, but not completely subject to its jurisdiction; this was considered so obvious that it was sufficient reason to defeat Sen. Doolittle's amendment to explicitly exclude Indians:

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> In one sense, all persons born within the geographical limits of the United states are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect; and so with these Indians.

CONGRESSIONAL GLOBE, *supra*, at 2897 (Sen. Howard).

To the authors, as expressed by the amendment's author, Sen. Howard, and the Chairman of the Judiciary Committee, Sen. Trumbull, "subject to the jurisdiction" of the United States meant simply that the person did not "ow[e] allegiance, partial allegiance if you please, to some other government." *Id.*, at 2984 (Sen. Trumbull).

In other words, rather than believing that presence in the United States would immediately and automatically oust any and all other allegiances to other governments, the authors of the jurisdiction requirement believed that allegiance to a foreign government could remain even while an alien was within the territory of the United States. The remaining allegiance to a foreign power, even if only "partial," was cognizable in determining whether someone was "subject to the jurisdiction" of the United States. If a person retained even some allegiance to another government while within the United States, the person was not subject to the "complete jurisdiction" of the United States.

In this Court, naturalization-related cases, including some which cite *Wong*, similarly recognize the continuation of partial allegiance by those residing in the United States and

require some type of residence, allegiance or permanence on the part of the applicant for citizenship. In *Rogers v. Bellei*, 401 U.S. 815, 834 (1971), for example, the Court noted "the importance of residence in this country as the talisman of dedicated attachment", *citing*, *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927).

Seen in this manner, "partial" allegiance analysis is not difficult. Persons born of citizens have no such partial allegiances. Persons on the road to citizenship or otherwise precluded from immediate citizenship could demonstrate allegiance through their intentions to join society as best they could. They have, in other words, "talismans of dedicated attachment." *Rogers v. Bellei*, 401 U.S. at 834. Persons who were only temporary "sojourners" would have more difficulty demonstrating they did not have at least partial allegiances to another power.

This sort of analysis was recognized by this Court in *Elk v. Wilkins*, written by Justice Gray himself. 112 U.S. 94 (1884). In *Elk*, John Elk, an Indian who had forsaken his tribe, sought the right to vote. Elk argued that he had renounced his allegiance to his tribe. Justice Gray, for the Court, rejected his claim – on telling grounds:

> Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States.

112 U.S. at 99.

Even Justice Gray's opinion in *Wong* uses these tests as its final foundation. After a very long (though selective and incomplete) analysis of English common law, Justice Gray concludes his analysis by reviewing the statement of facts

agreed upon by the parties. Justice Gray emphasized that the Wongs "ha[d] a permanent domicil and residence in the United States." 169 U.S. at 653. Although they could not have become citizens under the naturalization laws of the time, the Wongs demonstrated the allegiance to the United States sought by both Justice Gray and the authors of the jurisdiction requirement, not by accident of geography, but by explicit indicators of will and intent: "his residence has always been in the United States, and not elsewhere," 169 U.S. at 704; his temporary visits abroad were always made with the intention of returning to the United States, *id.*, he always returned to the United States, *id.*, and neither he nor his parents ever renounced his citizenship or did anything to exclude him from citizenship. 169 U.S. at 704-05. These "talismans of dedicated attachment," *Rogers v. Bellei*, 401 U.S. at 834, were sufficient to show that Wong Kim Ark had been born subject to the complete jurisdiction of the United States.

Justice Gray's concern about using the full jurisdiction requirement was apparent in this passage: "To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States." 169 U.S. at 694. But as shown above, this concern is easily ameliorated by something less than evisceration of the authors' intent to require some form of allegiance; any other form of demonstration of allegiance would produce the same result as it did in his own opinion in *Wong*.

Put simply, in an effort to avoid a perceived ill effect, Justice Gray swung too broadly in *Wong Kim Ark*. In so doing,

he cut down the jurisdiction requirement to something less than its authors and this Court's earlier cases intended.

B) The Faulty Wong Analysis Lives On and Exacerbates Other National Problems:

Nevertheless, Justice Gray's analysis in *Wong* lives on. This Court has cited *Wong* with approval, but without further analysis. *See, e.g., Weedin v. Chin Bow*, 274 U.S. 657, 670 (1927)("The majority in [*Wong*], as already said, held that the fundamental principle of the common law with regard to nationality was birth within the allegiance of the government and that one born in the United States, although of a race and of a parentage denied naturalization under the law, was nevertheless, under the language of the Fourteenth Amendment, a citizen of the United States by virtue of the *jus soli* embodied in the amendment."); *Rogers v. Bellei*, 401 U.S. 815, 830 (1971)(Citizenship Clause reflects law existing at the time); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 n.10 (1963)(same).

Other cases have simply asserted that a child of alien parents "born in the United States, was a citizen of this country" without further analysis. *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985)(child of illegal immigrants from Mexico); *Morrison v. California*, 291 U.S. 83, 85 (1933)(child of parents of Japanese descent).

In *Plyler v. Doe*, 457 U.S. 202 (1982), however, the majority opinion went further than earlier cases, by quoting, in a footnote, from Justice Gray's analysis in *Wong* and describing the analysis as detailing "the predominantly geographic sense in which the term 'jurisdiction' was used." 457 U.S. at 211. Yet, as shown *supra*, the authors of the jurisdiction requirement did not suggest any "geographic sense" to the term "jurisdiction;" they were predominantly concerned with

allegiance, since geography was already addressed by birth "in the United States."

Even the *Plyler* dicta employed the same type of "permanence" test used in *Wong* and cited in *Weedin* and *Bellei* to decide that illegal immigrant children should not be charged out-of-state educational tuition. 457 U.S. at 218-19 and n. 17 ("This situation raises the specter of a permanent caste of undocumented resident aliens. . .", *citing* "legalization" or amnesty proposals, and quoting the Attorney General as noting that this "subclass is largely composed of persons with a permanent attachment to the Nation"). The *Plyler* Court noted that the District Court's findings of fact in that case found that the families there "migrated illegally and – for all practical purposes – permanently to the United States." 457 U.S. at 207. In footnote 3, the *Plyler* Court noted the lower court's distinction between these "permanent" illegal residents and "those illegal aliens who entered the country alone . . . and who in many instances remained in this country for only a short period of time." 457 U.S. at 207 n. 3.

The irony of the *Plyler* dicta is that it is more likely to increase the probability of creating "the specter of a permanent caste of undocumented resident aliens," 457 U.S. at 418, than to ease it. The actual result of *Plyler* is to create or strengthen a magnet for more illegal immigration to the United States in the hope of obtaining free education and other welfare benefits. *See,* n. 4 *supra*; *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D.Cal. 1995) (citing *Plyler* to strike down ballot initiative – whose chief spokesman was *amicus* Cong. Dana Rohrabacher – to deny social services to illegal immigrants). In the same way, the net effect of the continuing attack on the jurisdiction requirement (by deeming a child born in the United States of any alien to be a citizen without regard

to the jurisdiction requirement) is to encourage more "drive-by citizenship."

The sweeping and imprecise language used in these decisions, however, perpetuates Justice Gray's flawed analysis in *Wong*. The Court should not use similar language in this case, or otherwise further weaken the jurisdiction requirement by describing citizenship as being based solely on geography without reference to the jurisdiction requirement.

III. Petitioner Hamdi is An Alien Who Has No Allegiance to the United States and Who Was Not Born "Subject to the Jurisdiction" of the United States:

Wong Kim Ark demonstrated the "allegiance" sought by the jurisdiction requirement, through his and his parents' permanent residence, his actions and his obvious attachment to this country. On the basis of assertions by the Attorney General and findings by the lower court of permanence and attachment to American society, this Court found the same to be true of illegal immigrant families in *Plyler*. 457 U.S. at 207, n. 3.

In this case, however, Hamdi has and can offer no such allegiance or attachment. His and his parents' residence was temporary. Hamdi remained, at all times, subject to another government. Neither Hamdi nor his parents ever demonstrated any intention of remaining in the United States (and, under the terms of a non-immigrant visa as a visitor for business, they could not have done so). They never acted in a manner consistent with attachment to the United States.

Hamdi left the United States as an infant, never to return. He describes himself as a Saudi citizen. Ultimately, Hamdi apparently served as an enemy combatant opposed to the United States and its allied forces.

Hamdi's service in a military force opposed to the United States is a complete denial of his "imperative

obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 159.

How, in these circumstances, can Hamdi claim the same citizenship rights as a person who was born "subject to the complete jurisdiction" of the United States? Hamdi is in the same position as John Elk: he may have been born within the territory of the United States, but he shows no "talismans of dedicated attachment." *Bellei*, 401 U.S. at 834.

In this case, Hamdi described himself as a "Saudi citizen." Mobbs Declaration, J.A. 61, ¶ 5. He and his parents were temporary residents of the United States, but at all times owing allegiance to the Kingdom of Saudi Arabia. They were, just as with "Indians not taxed," subject to a foreign power, owing at least partial allegiance to a foreign power, and thus not subject to the jurisdiction of the United States in every way. They were, in short, sojourners, not subject to the complete jurisdiction of the United States.

Petitioner Hamdi was born in the United States, but he has not demonstrated that he has fulfilled the jurisdiction requirement of the Citizenship Clause of the Fourteenth Amendment. He was not born "subject to the jurisdiction" of the United States.

CONCLUSION

Amici therefore respectfully urge the Court to affirm the decision below.

BARNABY W. ZALL
Counsel of Record for Amici Curiae
Weinberg & Jacobs, LLP
11300 Rockville Pike, #1200
Rockville, MD 20852
(301) 468-5500

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IN THE

Supreme Court of the United States

YASER ESAM HAMDI and ESAM FOUAD HAMDI,
as Next Friend of Yaser Esam Hamdi,
Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOE BARTON, WALTER JONES, AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Thomas V. Loran
William T. DeVinney
(Counsel of Record)
Pillsbury Winthrop LLP
1133 Connecticut Ave., NW
Washington, DC 20036
(202) 775-9800

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QUESTIONS PRESENTED

1. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub.L.No. 107-40, 115 Stat. 224, to seize on a foreign battlefield and detain a United States citizen based on a determination by the American military that he is an enemy combatant who: affiliated with a Taliban military unit, received weapons training, and was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle in Afghanistan.

2. Whether the appeals court provided Petitioner with an adequate hearing regarding the military's determination that he is an enemy combatant.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOE BARTON, WALTER JONES, AND LAMAR SMITH, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom., Rasul v. Bush*, No. 03-334 (U.S., dec. pending); *Rumsfeld v. Padilla*, No. 03-1027 (U.S. dec. pending); *Sosa v. Alvarez-Machain*, No. 03-339 (U.S., dec. pending); *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed a brief in this matter when it was before the court of appeals.

The Honorable Joe Barton, the Honorable Walter Jones, and the Honorable Lamar Smith are United States Representatives from Texas, North Carolina and Texas, respectively. They strongly support the efforts of the Executive Branch to protect the American people by taking

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

aggressive steps to defeat terrorist organizations that have declared war on the United States. All three supported the joint resolution adopted by Congress on September 18, 2001, Pub. L. 107-40, which authorized the President to use "all necessary and appropriate force" to defeat those organizations; they believe that the joint resolution unquestionably authorizes the President to detain enemy combatants (both citizens and aliens) who take up arms against the United States in support of those organizations.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that one of the best protections our nation has against terrorist attacks is a strong Executive Branch possessing broad decision-making powers with regard to the war on terror, as contemplated by the framers of our Constitution. Specifically, when our military leaders determine that an individual should be detained as an enemy combatant, the Judiciary should show substantial deference to that decision. The Judiciary is ill-equipped to make independent findings as to matters of foreign policy, especially those involving overseas combat. Petitioner's citizenship entitles him to ask the courts to protect him from arbitrary or discriminatory detention; it does not entitle him to *de novo* review of military determinations.

STATEMENT OF THE CASE

Al Qaeda is a network of terrorist groups that has conducted attacks throughout the world. Those attacks had all

occurred outside of the United States until September 11, 2001, when al Qaeda coordinated the series of attacks on the United States that killed approximately 3,000 people.

The President and Congress promptly responded to ensure that the United States would not be subject to further attacks. Congress declared that al Qaeda continued to represent an "unusual and extraordinary threat to national security," and recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, Sec. 2(a), 115 Stat. 224 (2001) ("AUMF"). Congress endorsed the President's use, in his capacity as Commander in Chief of the armed forces, of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." *Id.*

The President thereafter ordered the United States military to enter Afghanistan to attack al Qaeda forces, as well as forces of the ruling Taliban which had supported and provided refuge for al Qaeda. The Afghanistan operation, named operation Enduring Freedom, began on October 7, 2001, and hostilities continue to this day.[2]

During the course of Enduring Freedom, the military captured thousands of enemy combatants allied with the Taliban or al Qaeda. Military leaders determined that many of those captured troops must be detained throughout the course

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[2] *See, e.g.*, Pamela Constable, "U.S. Launches New Operation in Afghanistan," *Washington Post*, March 14, 2004, at A22.

of the hostilities to prevent those troops from rejoining enemy forces.

One of the captured enemy troops was Petitioner Yaser Esam Hamdi. Declaration of Michael H. Mobbs ("Mobbs Decl.") ¶ 4, J.A. 149. Based on conversation with Hamdi and others, the military has concluded that Hamdi went to Afghanistan prior to September 11, 2001 to train with and, if necessary, fight for the Taliban. *Id.* at 148, ¶ 3. He remained there when the United States began operation Enduring Freedom. *Id.* The military has further determined that while battling Northern Alliance forces near Konduz, Afghanistan, Hamdi surrendered to the Northern Alliance along with his entire Taliban unit. *Id.* at 149, ¶ 4. The military has determined that at the time of his surrender, Hamdi was disarmed of his Kalishnakov assault rifle. Id.[3]

Northern Alliance forces later turned Hamdi over to U.S. custody. Following its interrogation of Hamdi, the American military determined that Hamdi met its criteria for detention as an enemy combatant. *Id.* at 149, ¶¶ 6-7. He was transferred to Guantanamo Bay, Cuba in January 2002. After military officials learned in April 2002 that he had been born in Louisiana, Hamdi was transferred first to Virginia and then to the Naval Brig in Charleston, South Carolina, where he has been held without charges for nearly two years.

On June 11, 2002, Hamdi's father, Esam Fouad Hamdi, filed a next-friend habeas action on behalf of his son in U.S. District Court for the Eastern District of Virginia. The petition alleged that Hamdi is a U.S. citizen and therefore entitled to all

[3] The Kalishnakov rifle is a combat weapon similar to the M-16 used by United States armed forces.

protections of the Constitution, and that his detention without charges or counsel violated the Fifth and Fourteenth Amendments. That same day, before the petition was served on Respondents, the district court appointed the public defender as Hamdi's counsel and ordered that, no later than July 14, 2002, Hamdi was to have unsupervised access to counsel. J.A. 336-37.

The government appealed to the Fourth Circuit, which reversed the district court's order on July 12, 2002. The appeals court held that granting unsupervised access to counsel to someone determined by the American military to be an enemy combatant had "sweeping implications for the posture of the judicial branch during a time of international conflict." *Id.* at 340. The court cautioned that "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and that on remand the district court should exercise "deference to the political branches." *Id.* at 341. The appeals nonetheless declined to grant the government's request to dismiss the petition outright, stating:

> Any dismissal of the petition at this point would be [] premature . . . [and] would be summarily embracing a sweeping proposition -- namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.

Id.

On remand, the government filed a motion to dismiss the petition, supported by a declaration from Michael Mobbs, the Under Secretary of Defense for Policy. J.A. 148-150. The Mobbs Declaration sets forth the factual findings underlying the U.S. military's determination that Hamdi is an enemy

combatant subject to detention for the duration of hostilities. At an August 13, 2002 hearing on the motion, the district judge accepted the government's determination that Hamdi went to Afghanistan to be with a Taliban military unit and that he was armed when captured. J.A. 236. He stated that "[Hamdi] was there to fight. And that's correct." *Id.* at 255. Nonetheless, in an August 16, 2002 order denying the motion, the district judge held that the Mobbs Declaration fell "far short" of supporting Hamdi's detention; he noted, for example, that the declaration did not contend that Hamdi had ever fired his rifle. J.A. 292. He ordered the government to turn over to Hamdi's counsel voluminous materials, including the notes from any interviews with Hamdi. *Id.*

The government again appealed to the Fourth Circuit, which reversed the district court's production order and directed that the petition be dismissed. J.A. 416 - 455. The appeals court held that the Executive Branch possesses broad constitutional authority to undertake military campaigns it deems to be in the national interest, and that that authority includes the power to detain enemy combatants for the duration of hostilities. *Id.* at 426. It further held that because the judiciary is not similarly equipped "to supervise the conduct of overseas conflict," the federal courts properly have "shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Id.* It rejected Hamdi's claim that Congress had adopted legislation purporting to prohibit military detention of uncharged American citizens as enemy combatants.

While acknowledging Hamdi's right to challenge his detention by means of a habeas petition, the appeals court held that the averments of the Mobbs Declaration were sufficient to establish a *prima facie* case that "Hamdi's detention conforms

with a legitimate exercise of the war powers." *Id.* at 443. The court held that in light of the Mobbs Declaration and because Hamdi's petition "place[d] him squarely within the zone of active combat," further "factual inquiry into the circumstances of Hamdi's capture would be inappropriate." *Id.* at 447-48. Accordingly, the court dismissed the petition.

On July 9, 2003, the Fourth Circuit voted 8-4 to deny Hamdi's petition for rehearing.

SUMMARY OF ARGUMENT

One of our nation's greatest protections against foreign threat is the authority vested in the President by Article II of the Constitution to act as Commander in Chief in times of armed conflict. That authority allows the President to handle the exigencies of war largely unencumbered by the deliberative process of the Congress or the evidentiary burdens imposed by the Judiciary.

When, as here, Congress has explicitly endorsed the President's decision to use military force, the courts should be particularly reluctant to second-guess the wisdom of specific military decisions. But even when the Executive Branch is acting on its own to take steps that it views as necessary to promote the national defense, the courts have only a limited role to play in reviewing those actions. The Court has recognized that waging war is the prerogative of the political branches and has shown great deference to the President's actions taken pursuant to the war powers.

Those principles dictate that the Fourth Circuit's decision be affirmed. Congress endorsed the President's exercise of his Commander-in-Chief powers under Article II, Section 2 of the Constitution when it passed the AUMF authorizing him to use

"all necessary force" to wage the war on terrorism and its sponsors. Such a broad delegation of authority must necessarily include the authority to capture and detain enemy combatants. The military necessity of capturing enemy soldiers and detaining them for the duration of hostilities has been recognized since the founding of our nation, and has never been doubted by this Court. As the Fourth Circuit noted, it is well-settled that such detention is necessary to "prevent enemy combatants from re-joining the enemy and continuing to fight against America" and is within the scope of the President's Article II war power. J.A. 425.

That Hamdi may be an American citizen does not affect the President's power to detain him pursuant to Article II. As this Court has held, "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences" of his actions. *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

Hamdi's claim to citizenship, however, does afford him access to the United States courts to challenge his detention. *Compare In re Territo*, 156 F.2d 142 (9th Cir. 1946) (addressing habeas petition by prisoner of war who was also American citizen), *with Johnson v. Eisentrager*, 339 U.S. 763 (1950) (enemy aliens held overseas are not entitled to judicial review of their detention). *Amici* do not contest that Hamdi, as an American citizen, is entitled to judicial review of his detention as an enemy combatant, nor do *amici* contest that Hamdi has a right to be represented by counsel during that review. Hamdi's right to petition the Judiciary, however, is subject to the limits on the Judiciary's authority under the Constitution to second-guess the President's exercise of his Commander-in-Chief powers. As noted above, the President's war powers permit him to capture and detain enemy combatants. The Mobbs Declaration makes a *prima facie*

showing that Hamdi is an enemy combatant. In the absence of any evidence from Hamdi calling the Mobbs Declaration into question -- and indeed, Hamdi's habeas petition concedes his presence in the Afghanistan war zone -- the Fourth Circuit properly dismissed the petition.

ARGUMENT

I. THE PRESIDENT'S COMMANDER-IN-CHIEF POWERS AUTHORIZE HIM TO DETAIN HAMDI AS AN ENEMY COMBATANT REGARDLESS OF HAMDI'S CITIZENSHIP

The Constitution provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const. art. II, Sec. 2. Those Commander-in-Chief powers grant the President "the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war." *Quirin*, 317 U.S. at 26. The President's war power "is not restricted to the winning of victories in the field and the repulse of enemy forces," but "extends to every manner and activity so related to war as substantially to affect its conduct and progress." *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *Cf. United States v. Macintosh*, 283 U.S. 605, 622 (1931) ("from its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law").

The President's war power includes the authority to capture and detain enemy combatants. The detention of enemy combatants is a necessary incident to the conduct of war and falls within the President's prerogatives. *See Hirota v.*

MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the Commander in Chief . . . had the final say."). This Court repeatedly has addressed the President's detention of enemy combatants, whether lawful or unlawful, without questioning his authority to do so. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Quirin*, 317 U.S. at 31; *see also Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

Despite the centuries-long acceptance of the practice of detaining enemy combatants without hearing for the duration of hostilities, Hamdi argues that the President lacks inherent authority under Article II to detain enemy combatants. Hamdi relies principally on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to support this argument. *See* Pet. Br. at 38, 39, 44-45. *Youngstown* provides no such support.

In *Youngstown*, the Court addressed President Truman's seizure of the nation's steel mills to prevent their closure during a nationwide steelworkers strike. The President argued that the seizure was proper pursuant to his authority as Commander in Chief because steel production was vital to the nation's security -- steel was needed to produce arms being used in the Korean War. The Court rejected that argument, stating, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Youngstown*, 343 U.S. at 587. The Court held that the seizure of private property within the United States to avoid labor strife was too far afield from traditional understandings of "military affairs" to fall within the

President's Commander-in-Chief powers. Nothing in the opinion suggests that those powers do not include the detention of enemy combatants -- an activity at the core of traditionally-accepted military activities.[4]

Hamdi cites *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), for the proposition that the President's power to detain enemy combatants exists only with Congress' prior authorization. Hamdi has misinterpreted *Brown*, which addressed the wartime seizure (by a private citizen who filed a *qui tam* action) of private property belonging to citizens of an enemy nation. After canvassing the law of nations, the Court concluded, "The modern rule would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial

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[4] Even assuming, *arguendo*, that the President's war powers did not inherently include the right to detain enemy combatants, Congress granted that authority when it enacted the AUMF. It is inconceivable that in authorizing the President to use "all necessary and appropriate force," Congress did not intend to authorize the detention of enemy combatants. AUMF, § 2(a). Treaties regarding the rules of war have long recognized that waging war will necessarily involve captured combatants. *See* The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; The Lieber Code of 1863, available at http://www.civilwarhome.com/liebercode.htm (last visited March 17, 2004). The Lieber Code of 1863 governed the conduct of the Union Army in the Civil War and was used as a model code for many modern war treaties. *See* Michael Beattie and Lisa Yonka Stevens, *Comment: An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?*, 62 Md. L. Rev. 975, 1001-02 (2003). The AUMF contains no language suggesting that Congress, while otherwise endorsing the President's broad use of military force to battle al Qaeda and its allies, sought to prevent him from engaging in the well-accepted practice of detaining enemy combatants.

treaty an article is inserted stipulating for the right to withdraw such property." *Brown*, 12 U.S. (8 Cranch) at 125. While acknowledging that the United States was not *required* to abide by the law of nations in this respect, the Court indicated that it would not conclude that the U.S. had decided to abandon customary practice without some affirmative indication to that effect. The Court determined that it was up to Congress to make such a decision, citing Article I, Sec. 8 of the Constitution.[5] *Id.* at 126. It further determined that although Congress had authorized the seizure of enemy aliens found within the United States,[6] it had not authorized the seizure of enemy property; and that the declaration of war against England did not, of itself, "authorize proceedings against the persons or property of the enemy found, at the time, within the territory" of the United States. *Id.*

Brown is wholly inapposite; it has nothing to say about the President's use of military power or the detention of enemy *combatants*. It involved the seizure of private property within the United States, and its brief discussion of the seizure of individuals was confined to the seizure of enemy *noncombatants* found within the U.S. at the outbreak of war. Moreover, the Court's decision that private citizens (purporting to act on behalf of the government) had not been authorized by Congress to seize property belonging to enemy aliens and located within the United States was based in large measure on a long-standing international custom disfavoring such seizures. In contrast and as noted above, the long-standing custom with

[5] Article I, Sec. 8, cl. 9 states in part, "Congress shall have power . . . "[to] make Rules concerning Captures on Land and Water."

[6] Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (now codified at 50 U.S.C. § 21).

respect to enemy combatants is that they *are* subject to detention for the duration of hostilities.[7]

Nor can Hamdi's interpretation of *Brown* by squared with later decisions of this Court, which have endorsed the President's broad authority over foreign policy and military matters. The Court has held, for example, that in matters relating to foreign affairs, the other branches of government "must often accord to the President a degree of discretion and freedom from statutory restriction" as "he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially this is true in time of war." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Subsequent decisions have cited *Curtiss-Wright* approvingly on numerous occasions, and have recognized that the President's Commander-in-Chief powers include the power to detain enemy combatants. *See, e.g., Hirota v. MacArthur*, 338 U.S. at 215 (Douglas, J., concurring).

[7] Furthermore, the Court in *Brown* emphasized that its decision was predicated on a finding that the property in question had been off-loaded at New Bedford harbor and was physically located within the United States. *Brown*, 12 U.S. (8 Cranch) at 121. Later decisions make clear not only that enemy property found *outside* the United States is subject to seizure even if it is not within a war zone, but also that the President may order such seizure without explicit congressional authorization. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (when the United States is attacked, the President not only is authorized by the Constitution to take appropriate counter measures -- including invoking the laws of war -- but also "is bound to accept the challenge without waiting for any special legislative authority."). The Court held that nonmilitary cargo belonging to citizens residing in Confederate states was properly seized at the President's direction under the laws of war as "enemies' property" regardless that the property was seized on the High Seas and not in any military zone. *Id.* at 674.

A. Hamdi's Alleged U.S. Citizenship Does Not Negate The President's Authority to Detain Him as an Enemy Combatant

That Hamdi may be a United States citizen does not affect the President's right to detain him as an enemy combatant. In *Quirin*, the Court addressed a habeas petition of eight Nazi saboteurs during World War II who were captured, tried, and sentenced by a military tribunal for crimes of war. One of those petitioners was an American citizen. The Court nonetheless found that he was subject to detention and prosecution as an enemy combatant, stating that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences" of his actions. *Quirin*, 317 U.S. at 37.

The federal appeals courts have reached the same conclusion. In *Territo*, the Ninth Circuit addressed the habeas petition of a member of the Italian armed forces during World War II who had been born in the United States. *In re Territo*, 156 F.2d 142 (9th Cir. 1946). He was captured during a battle in Sicily and brought to the United States, where he challenged his detention. The Ninth Circuit rejected the challenge, holding that "all persons who are active in opposing an army in war may be captured" and that there was no legal authority "supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle." *Territo*, 156 F.2d at 145.

Similarly, the Tenth Circuit rejected the habeas petition of an American citizen convicted by a military tribunal of spying for the German Reich during World War II. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The petitioner contested his classification as an unlawful belligerent and

subsequent trial by a military tribunal. The Tenth Circuit upheld the classification and conviction, holding that "the petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war." *Id.* at 432.

As noted above, a citizen has more rights than a noncitizen to invoke the jurisdiction of the federal courts for purposes of challenging his detention and contesting his designation as an enemy combatant. But if he is, in fact, an enemy combatant, a citizen is as subject as anyone else to detention for the duration of hostilities.

B. The President Is Not Required to Release Hamdi Now That He Is Outside the Field of Battle

Hamdi argues alternatively that because of his claim to citizenship, the President is authorized to detain him as an enemy combatant only so long as he is within the actual field of battle. Because he has now been moved to South Carolina and has not been charged with a crime, Hamdi claims that he must be released. Pet. Br. 28-35.

Hamdi's claim is without merit. Regardless of the location of Hamdi's detention, the decision to detain him retains its military character. The right to detain enemy combatant without charges derives from the well-established customs of war, not from the happenstance that no civil courts remain open on the battlefield.

This Court addressed a similar argument in *Quirin*. The petitioners, and especially the petitioner who was a United States citizen, argued that they were entitled to a trial in a civilian court because they were captured and detained within the continental United States, in areas far removed from the

battlefield and where courts were open and operating normally. They sought to rely on *Ex Parte Milligan*, which held that a civilian may not be tried by a military tribunal "where the courts are open and their process unobstructed." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). *Quirin* dismissed the petitioners' arguments by noting that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Quirin*, 317 U.S. at 45. Similarly, because the government has determined Hamdi *is* "a part of or associated with the armed forces of the enemy," he can garner no support from *Milligan*.

Seeking to distinguish *Quirin*, Hamdi asserts that *Quirin* stands merely for the proposition that the military may exercise authority over citizens only pursuant to "congressionally authorized military prosecutions of citizens charged with violating the laws of war." Pet. Br. 30. *Quirin* is not so limited; it authorized not only the military prosecution of American enemy combatants but also their detention. *Quirin*, 317 U.S. at 28, 31. Similarly, the petitioner in *Territo* was a U.S. citizen detained as an enemy combatant -- he had fought in the Italian army. The Ninth Circuit upheld his continued detention without charges even after he was brought to the United States as a prisoner of war. The Ninth Circuit noted that he was in the United States and away from the field of battle, as were "thousands" of other prisoners of war, but did not find any reason that he could not be detained. *In re Territo*, 156 F.2d at 146.

Indeed, Hamdi's argument would work an absurd result. The President would have to either detain enemy combatants close to the field of battle and in harm's way, or move them away from the battlefield and risk being ordered by a court to release any prisoner that claimed citizenship. That result bears no relationship to the rationale justifying detention of enemy

combatants: preventing them from returning to their former comrades-in-arms while hostilities continue. That rationale remains just as strong regardless where an enemy combatant is being detained.

II. HAMDI HAS BEEN PROVIDED AN ADEQUATE OPPORTUNITY TO CONTEST HIS DETENTION

Amici strongly support Hamdi's right to seek judicial review of his detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301 (2001). Particularly where, as here, Hamdi is being detained without having had the benefit of a military hearing, it is important that he be provided a meaningful opportunity to demonstrate that his detention is wholly arbitrary and/or unjust. For example, he is entitled to -- and received -- *de novo* review of the government's determination that it possessed constitutional and statutory authority to detain American citizens determined to be enemy combatants.

Nonetheless, the Fourth Circuit correctly determined that a deferential standard of review must be applied to the government's determination that Hamdi was a Taliban fighter (and thus an enemy combatant). The Constitution invests Congress with the power to authorize military action and the President with the power to wage war. As the Court explained in *Quirin*:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all

> laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

Quirin, 317 U.S. at 26.

In contrast, Article III of the Constitution grants to the judiciary nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. Accordingly, the Court has shown great deference to the political branches of government when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. *See, e.g., Curtiss-Wright*, 299 U.S. at 319-20; *The Prize Cases*, 67 U.S. (2 Black) at 670; *Quirin*, 317 U.S. at 25 (noting that acts "by the President in the declared exercise of his power as Commander in Chief of the Army in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted"). As the appeals court explained below, deference is required because "the executive and legislative branches are organized to supervise the conduct of overseas conflicts in a way that the judiciary simply is not." J.A. 427. This Court has noted with regard to military affairs:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

Deference is particularly warranted with respect to "enemy combatant" detention decisions because such decisions so directly impact the ability of military commanders to wage war. As the Court held in a related context, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from" ongoing military offensives to "the legal defensive." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

Amici submit that the Fourth Circuit adequately balanced the constitutional mandates that, on the one hand, all citizens be provided a meaningful opportunity to contest their detention and, on the other hand, the courts not intrude into military decisions that are beyond their expertise. It did not permit Hamdi's detention to continue without explanation; rather, it insisted that the military provide a detailed account of the bases for its decision to hold Hamdi as a enemy combatant. But particularly in light of Hamdi's concession that he was present on the battlefield in Afghanistan, the Fourth Circuit properly ruled that the determinations set forth in the Mobbs Declaration were sufficient to justify dismissal of Hamdi's petition.

Hamdi insists that the judicial review afforded him by the Fourth Circuit cannot be deemed "meaningful." Pet. Br. 14-20. But tellingly, even now -- two years after his counsel filed a habeas petition on his behalf with the assistance of his father and after having had an opportunity to meet with counsel -- Hamdi has provided this Court with *no* basis for challenging the military's good faith in making the determinations set forth in the Mobbs Declaration. Rather, he rests his challenge to the Fourth Circuit's procedures solely on his supposed right to stand on a general denial of the military's determinations, and

on the Fourth Circuit's rejection of the district court's order granting counsel detailed discovery into military records. Pet. Br. 15. Accepting Hamdi's position would require the courts to abandon the deference they traditionally (and correctly) afford to military decision-making. Under a rule of deference, it is not up to the military to provide admissible evidence to support its determination that Hamdi is a enemy combatant. Rather, once the government has established that it possesses the requisite authority to detain enemy combatants and has submitted a declaration setting forth its bases for determining that a citizen is an enemy combatant, the burden shifts to the petitioner to provide evidence demonstrating that the government is acting in bad faith or that its detention decision is totally arbitrary. Hamdi has not carried that burden, despite being given adequate opportunity to do so.

The reason why Hamdi is entitled to judicial review is not because it is somehow un-American to hold an American citizen without charges; to the contrary, the propriety of such detention is well established when the citizen is an enemy combatant. Rather, judicial review is warranted to guard against the danger of abuse of power by the Executive Branch. It is possible that the Executive Branch may seek to detain its political enemies as "enemy combatants," and *amici* share the concern of all liberty-loving citizens that the judiciary always be on guard against such abuse. But the role of the judiciary should be to guard against clear abuse, not to second-guess the national security decisions of our elected leaders.

Evidence that the government has abused its power would include evidence that Hamdi is being detained based on some racial stereotype. *See Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, dissenting) (exclusion of defendant from the West Coast was based not on an individual finding of dangerousness, but rather on the unreasonable

assumption that all citizens "of Japanese ancestry must have a dangerous tendency to commit sabotage and espionage."). But Hamdi introduced no evidence of unreasonable racial stereotyping. Moreover, the Mobbs Declaration does not recite generalizations regarding groups of which Hamdi happens to be a member; rather, it recites specific facts regarding Hamdi's actions in support of the Taliban war effort.[8]

Nor has Hamdi cited other evidence suggesting abuse of power. Hamdi has no history of outspoken political opposition to the federal government, so there is no reason to believe he is being retaliated against for his speech. Moreover, *amici* are aware of only one other American citizen being held as an enemy combatant in connection with the current war: Jose Padilla. In the absence of evidence that large numbers of citizens are being detained under circumstances similar to Hamdi's, there is no reason to suspect that the President is detaining Hamdi based on anything other than a considered judgment that Hamdi is, in fact, a Taliban soldier.

The Court has rightly been concerned by government efforts to detain citizens based solely on predictions of future dangerousness and has imposed significant constitutional

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[8] Nothing in their dissents suggests that the three *Korematsu* dissenters would have had any objection to Hamdi's detention. The dissenters made clear that they would not have objected to evacuation orders directed to persons deemed by military leaders (based on individualized evidence) to be potential saboteurs. Indeed, in his dissent, Justice Jackson went out of his way to make clear that courts had absolutely no basis for second-guessing the soundness of military determinations. He dissented solely because the evacuation orders were based on blatant racial discrimination, not on military considerations, and because he deemed it inappropriate for the Court to attach its seal of approval to such discrimination. *Id.* at 245-48.

restrictions on such detentions. *See, e.g., Kansas v. Crane,* 534 U.S. 407 (2002); *United States v. Salerno,* 481 U.S. 739 (1987). But such cases have not arisen in the military context, where the Constitution demands judicial deference to the decisions of the elected branches of government. More importantly, Hamdi is not being detained based on predictions of future dangerousness; he is being detained in light of a determination that (based on his past conduct) he is a Taliban soldier. Once that determination is made, the laws of war permit the government to detain Hamdi for the duration of the conflict, regardless of whatever evidence Hamdi may present that he does not pose a danger to the American people.

Hamdi is correct that he has not been provided an opportunity to "pick apart" the Mobbs Declaration "piece by piece." But providing him meaningful review does not require providing him such an opportunity. Rather, unless the courts are to get into the business of second-guessing such quintessentially military determinations as who, among those found on a foreign battlefield, should be deemed to have aided the enemy, the courts must limit their review in this case to determining whether, despite the Mobbs Declaration's *prima facie* showing that the military detained Hamdi based on evidence sufficient to determine that he is an enemy combatant, the government has been acting arbitrarily or in bad faith. Because Hamdi has provided no such evidence and has not asked that the case be remanded to provide him with an opportunity to do so, the decision below should be affirmed.

Hamdi is mistaken in contending that the Fourth Circuit's refusal to permit review of the factual bases for his detention, as set forth in the Mobbs Declaration, is unprecedented. This Court has often deferred to the President by refusing to review the factual basis for actions taken pursuant to the war powers.

For example, in *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827), Congress had passed a statute authorizing the President to call up the militia in any state or area "whenever the United States shall be invaded, or be in imminent danger of invasion." *Martin*, 25 U.S. (12 Wheat) at 28-29. A citizen who was fined, and had his property seized to satisfy the fine, for failure to serve in the militia, challenged the seizure by claiming that no "imminent danger of invasion" existed to justify the President's call to activate the militia. The Court refused to consider whether an "imminent danger" existed, and held that "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Id.* at 30. Similarly, in *Curtiss-Wright*, the Court declined to review the President's determination that he had made factual findings sufficient to establish that a ban on arms sales to Bolivia would contribute to the reestablishment of peace in South America. *Curtiss-Wright*, 299 U.S. at 330-31.

The level of factual review urged by Hamdi, and originally ordered by the district court, fails to give proper deference to the President's authority under Article II to conduct military affairs. Any effort by the courts to second-guess the President's military decision to detain Hamdi, in the absence of evidence that he acted arbitrarily or in bad faith, would undermine the separation of powers provided for in the Constitution and would substantially weaken the Executive's authority to provide for the common defense in time of war.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be affirmed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Thomas V. Loran
William T. DeVinney
(Counsel of Record)
Pillsbury Winthrop LLP
1133 Connecticut Ave., NW
Washington, DC 20036
(202) 775-9800

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39D

No. 03-6696

MAR 29 2004

IN THE

Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

ANDREW SCHLAFLY
521 Fifth Ave. - 17th Floor
New York, NY 10175
(212) 292-4510

* Counsel of Record

KAREN B. TRIPP *
2245 Shakespeare Road
Houston, TX 77030
(713) 658-9323

Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For more than twenty years it has defended American sovereignty. EFELDF promotes adherence to the U.S. Constitution and has repeatedly opposed illegal immigration and erosion of our national borders. EFELDF consistently stands

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

in favor of enforcing immigration laws and defending the integrity of the American citizenship.

Amicus has a direct and vital interest in the issues presented to this Court based on its longstanding defense of principles of American sovereignty and citizenship.

SUMMARY OF ARGUMENT

Petitioner Yasser Esam Hamdi was captured as an enemy combatant during the United States military operation in Afghanistan, and then interviewed by United States interrogators. Michael H. Mobbs, Special Adviser to the Undersecretary of Defense for Policy, signed an affidavit dated July 24, 2002, recounting what Hamdi said during the interview. According to the affidavit, Hamdi identified himself as a Saudi citizen who had been born in the United States. Now he contradicts that by claiming to be a citizen of the United States, based merely on a birth certificate showing that he was born in Baton Rouge, Louisiana to Saudi Arabian parents.[2] But "[t]he inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed." *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902). There is no evidence of his parents intending to settle in the United States or even having a right to do so. Hamdi resided in Afghanistan when captured; his father, Esam Fouad Hamdi, joined this action from his country of Saudi Arabia.

Section 1401(a) of Title 8 of the United States Code defines a citizen to include "a person born in the United States, and subject to the jurisdiction thereof." This uses the same language as the Citizenship Clause of the Fourteenth Amendment. But there is no evidence the petitioner Hamdi

[2] http://news.findlaw.com/hdocs/docs/terrorism/hamdirums61102pet.pdf

or his parents ever consented to jurisdiction of the United States. In fact, all evidence is to the contrary. Apparently neither petitioner Hamdi nor his parents sought to settle in the United States or renounce their Saudi Arabian citizenship. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003). All evidence is that they retained allegiance to the government of Saudi Arabia. The facts and law militate against American citizenship for petitioner Hamdi.

Why, then, would there be any presumption that petitioner Hamdi is an American citizen? This case should be remanded for a determination on that threshold issue. Citizenship cannot be presumed. Granting automatic citizenship to Hamdi would confer it to millions of children of illegal aliens, and offspring of travelers who arrange to give birth in the United States for the sole purpose of attaining citizenship. Hamdi is not entitled to citizenship simply because he was born in a hospital in Louisiana during a sojourn here by his foreign parents. If this Court assumes that Hamdi possesses citizenship here, then a cautionary warning is appropriate to preclude application to other cases.

ARGUMENT

Citizenship, and all the rights and obligations that it entails, is not solely a function of place of birth. Ever since the Roman Empire, citizenship has been an honor granted to those who earn it, by inheritance or deed. St. Paul held Roman citizenship when most of his peers, born in the same location, did not. St. Paul invoked his citizenship at an opportune moment to stop an injustice: "Is it legal for you to flog a Roman citizen who is uncondemned?" Acts 22:25 (NRSV). Citizenship has always been a privilege, revocable by the sovereign, rather than a birthright. "Throughout history, forfeiture of citizenship and the corollary practices of banishment and exile have been used as punishment. In the

Roman Empire, when people lost their freedoms, they 'necessarily lost . . . citizenship' as well. For example, a Roman sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as servus poenae, suffered not just a loss of his freedom, but a loss of citizenship as well. Similarly, banishment was a weapon in the English legal arsenal for centuries." J.M. Spectar, *cited infra* Point II, at 280.

There is no precedent for the claim, implicit in this case, that physical location of birth alone establishes citizenship. Citizenship must be far more than that, transcending the vagaries of chance and manipulation. At a minimum, it requires consent by the sovereign. As discussed below, the Fourteenth Amendment embodies the consensual meaning of citizenship, as do rulings of this Court. Dire consequences await any dilution of citizenship based on the superficiality of physical location.

I. THERE IS NO LEGITIMATE CLAIM TO BIRTHRIGHT CITIZENSHIP FOR FOREIGNERS UNDER THE FOURTEENTH AMENDMENT.

Birth in the territory of the United States has never been an absolute entitlement to citizenship. The Fourteenth Amendment does not extend to children born to alien parents at war with the United States, nor to the children of diplomatic agents, American Indians, or illegal aliens. Its Citizenship Clause extends to "[a]ll persons born or naturalized in the United States, **and subject to the jurisdiction thereof**." U.S. Const. Amend. XIV (emphasis added). It is not the physical location of birth that defines citizenship, but the express or implied consent to jurisdiction of the sovereign. That consent is lacking in many important situations, perhaps including the one here, and the foregoing exclusions must be preserved in the disposition of this case.

This Court has recognized and enforced the jurisdictional requirement of the Citizenship Clause on several occasions. An American Indian did not automatically receive citizenship under this Clause when born into a tribe in the United States, for example. *See Elk v. Wilkins*, 112 U.S. 94 (1884). "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations." *Id.* at 102. The logic of this holding applies with equal force to visitors or aliens who remain loyal to foreign powers.

The common law in the British Empire recognized that offspring born to enemies in hostile occupation of British territory had no right to British citizenship, nor do the offspring of diplomatic agents. *See United States v. Wong Kim Ark*, 169 U.S. 649, 657-58 (1898). The Fourteenth Amendment did not change this. "Of course, **the mere physical fact of birth in the country does not make these children citizens of the United States**, inasmuch as they were at that time children of a duly accredited diplomatic representative of a foreign state. This is fundamental law and within the recognized exception not only to the Constitutional provision relative to citizenship, Amendment Article 14, Section I, but to the law of England and France and to our own law, from the very first settlement of the Colonies." *In Re Thenault*, 47 F. Supp. 952, 953 (D.D.C. 1942) (emphasis added).

The purpose behind the jurisdictional requirement of the Citizenship Clause is plain enough from its text, but is also

reinforced by the comments of its sponsor. Senator Jacob Merritt Howard of Michigan observed that the Citizenship Clause was "simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural and national law, a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). He then emphasized that the Clause did not include people born on American soil to foreigners. "This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons." *Id.*

Senator Edgar Cowan of Pennsylvania reiterated this basic theme. "It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power." *Id.* He directly addressed the problem of illegal immigration, despite being less of a concern then. "I do not know that there is any danger to many of the States in this Union; but is it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration. . . ? Are they to be immigrated out of house and home by Chinese? I should think not. . . . As I understand the rights of the States under the Constitution at present, California has the right, if she deems it proper, to forbid the entrance into her territory of any person she chooses who is not a citizen of some one of the United States. . . . I wish to be understood that I consider those people to have rights just the same as we have, but not rights in connection with our Government. If I desire the exercise of my rights, I ought to go to my own people, people of the same beliefs and traditions, and not thrust myself in upon a society of other men entirely different in all those respects from myself. I would not claim that right." *Id.* at 2890-91.

The Chairman of the Senate Judiciary Committee, Lyman Trumbull of Illinois, left no doubt that the jurisdictional condition in the Citizenship Clause adds a significant limitation on citizenship. Quoting the Clause—"all persons born in the United States, and subject to the jurisdiction thereof, are citizens"—Senator Trumbull added that it "means 'subject to the complete jurisdiction thereof.' . . . [Are] the Navajo Indians [] subject to the complete jurisdiction of the United States? By no means. We make treaties with them. . . . It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government . . . that he is "subject to the jurisdiction of the United States." . . . It is only those persons who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens." *Id.* at 2893.

Fundamental principles of statutory interpretation require that the term "jurisdiction" be construed in the context of "citizenship", which means far more than physical presence. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim noscitur a sociis, a word is known by the company it keeps, while not a inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (noting that a term should not be viewed "in isolation but in light of the words that accompany it and give [it] meaning"). The jurisdictional limitation on citizenship ensures that children of enemy combatants do not automatically become citizens of the United States by virtue of birth on American soil; nor do offspring of illegal aliens or foreign visitors. This Court has held that the Citizenship Clause excludes "children born of alien enemies in hostile occupation" of the United States, and "children of diplomatic representatives of a foreign State." *Wong Kim Ark*, 169 U.S.

at 682. Such interpretation comports with the language of the Clause and with common law.

In *Wong Kim Ark* this Court, quoting President Grant's Secretary of State Hamilton Fish, stated that "[t]he qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory **with rights of extraterritoriality**." *Id.* at 690 (quoting 2 Whart. Int. Dig. p. 394, emphasis added). The citizenship therefore does not hinge entirely on "parentage", but requires submission to the jurisdiction of the sovereign. Location of birth is not the *sine qua non* of citizenship; consent by the sovereign and the parties (or parents) is. Michigan Governor George Romney ran for president in 1968 as a natural-born citizen. He was born in Mexico, but his parents were U.S. citizens and the location of the birth is not controlling. Similarly, John McCain ran in 2000 as a natural-born citizen. He was born in the Panama Canal Zone, a U.S. territory, but his parents were U.S. citizens consenting to American jurisdiction.

In *Wong Kim Ark*, this Court did find birthright citizenship for a child of Chinese aliens subject to the Chinese Exclusion Act. "Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, **so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States**." 169 U.S. at 694 (emphasis added). This holding relied on the fear that "[t]o hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of

the United States." *Id.* Neither the holding nor rationale applies to illegal aliens, mere visitors or those who reject the sovereign authority of the United States. *See Smith v. United States*, 151 U.S. 50, 56 (1893) (denying citizenship where "it appears that the Indian was but temporarily a resident of a State, the length of his residence not being shown, and that he had done nothing to indicate his intention to sever his tribal relations").

This Court has held (5-4) that the Equal Protection Clause of the 14th Amendment requires providing free public education to the children of illegal aliens unless there is a "substantial state interest" not to. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). But Justice Powell emphasized, in concurrence, that "the power to deport is exercised infrequently by the Federal Government" and "the additional expense of admitting these children to public schools might fairly be shared by the Federal and State Governments." *Id.* at 241 (Powell, J., concurring). Justice Powell's concurrence, and the opinion of the dissenting four Justices, are entirely consistent with the power of the sovereign to deport the entire family of illegal aliens, implicitly including those born here. *Id.* at 236-54 (Powell, J., concurring, and Burger, C.J., dissenting). Ironically, the majority opinion in *Plyler* mandated publicly funded education because it "is the very foundation of good citizenship," without observing that the subjects were not citizens. *Id.* at 223. The dissent retorted that "[s]urely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation." *Id.* at 242 n.1 (Burger, C.J., dissenting). Deportation remains a largely unexercised power of the sovereign to this day. "Nor is it plausible for plaintiffs to fear that the federal government (*i.e.*, the Department of Justice or the Department of Homeland Security) would be hostile to plaintiffs or seek to deport them based on learning that they are plaintiffs in this suit" to overturn exclusion of

aliens from Virginia state colleges. *Jane Doe 1 v. Merten*, 219 F.R.D. 387, 395 (E.D. Va. 2004). Unexercised the power is, but not waived.

II. CITIZENSHIP MUST BE CONSENSUAL RATHER THAN ASCRIPTIVE.

The legal concept of citizenship has always been based on consent. Justice Joseph Story wrote in his Commentaries that:

> The doctrine maintained by many eminent writers upon public law in modern times is, that civil society has its foundation in a voluntary consent or submission; and, therefore, it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, Multitudo, juris consensu et utilitatis communione sociata; that is, (as Burlamaqui gives it,) a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.

Douglas G. Smith, "Citizenship and the Fourteenth Amendment," 34 San Diego L. Rev. 681, 697 (1997) (quoting 1 Joseph Story, Commentaries on the Constitution of the United States 225-26 (Thomas M. Cooley ed., 4th ed. Little, Brown, and Co. (1873), footnotes omitted)).

John Locke's theory of social compact, underlying the Declaration of Independence, emphasized that citizenship must ultimately be based on consent. "Philosopher John Locke . . . maintained that a child did not attain citizenship until s/he could legitimately give consent upon reaching adulthood." J.M. Spectar, "To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System," 39 Cal. W. L. Rev. 263, 276 n.89 (Spring, 2003) (citing Peter H.-Schuck & Rogers M. Smith, Citizenship Without Consent, Illegal Aliens in the American

Polity 23-24 (1985)). Consensual citizenship is the essential basis of the social compact between individual and the sovereign. Then, when the sovereign later exercises its jurisdiction, "a citizen cannot complain, because he has voluntarily submitted himself to such a form of government." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). Where that voluntary submission is lacking, so is citizenship.

Denying American citizenship to the offspring of ambassadors and diplomatic agents confirms that the touchstone is consent, not physical location. *See Wong Kim Ark*, quoted and discussed *supra* Point I. The Ninth Circuit elaborated on the denial of citizenship to persons born to diplomatic agents. *See Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994), *cert. denied*, 515 U.S. 1130 (1995). That court adhered to the historic exceptions to conferring citizenship upon domestic birth: (1) when the father is an alien enemy and the child is born during hostile occupation and (2) when the father is an "ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state ... (though born within the British dominions)." *Id.* at 1457 n.5 (quoting *Wong Kim Ark*, 169 U.S. at 658). The rationale for these exclusions applies to foreigners also. "The reason for these exceptions is that a person born under either of these circumstance **does not owe allegiance to the sovereign nation in whose territory that person is born**." 35 F.3d at 1457 n.5 (emphasis added).

The *Rabang* court denied citizenship to persons born in the Philippines while part of the territorial United States. The reason for the denial is that the Philippines had become a sovereign power. "The Philippine Islands are now a sovereign nation. Supreme Court precedent compels a conclusion that persons born in the Philippines during the territorial period were not 'born . . . in the United States,' within the meaning of the Citizenship Clause of the Fourteenth Amendment, and are thus not entitled to citizenship by birth."

Id. at 1454. The panel majority rejected the view of the dissent that "the Fourteenth Amendment [created] the inviolability of the fundamental right to citizenship by birth." *Id.* at 1466 (Pregerson, J., dissenting).

It is merely historical accident that citizenship became closely associated with territory in England, where ligeance was based entirely on geography. *See Calvin's Case*, 77 Eng. Rep. 382 (1608) (ligeance is based on the relationship "between lord and tenant that holdeth by homage," and on this basis the "King is called the liege lord of his subjects"). Where that homage (and thus territorial connection) was lacking, there was no birthright citizenship. *See id.* at 384 ("for if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject of the King of England though he be born upon his soil"); *see id.* at 399 ("if any of the King's ambassadors in foreign nations have children . . . they are natural born subjects [of England], yet they are born out of the Kings dominion").

The extensive litigation concerning American Indians illustrates that consent rather than ascription is what animates citizenship. Indians did not receive citizenship until conferred by congressional acts in 1887, 1901 and 1924, long after ratification of the Fourteenth Amendment. *See* General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-342, 348-349, 354 (1994)); Act of Mar. 3, 1901, ch. 853, 31 Stat. 1155; Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253. The Court applied the jurisdictional condition to deny citizenship to American Indians in *Elk v. Wilkins*, discussed *supra* Point I. There the Court affirmed that an Indian born into a tribe in the United States, who had voluntarily separated from his tribe to live with other American citizens, was not himself a citizen of the United States under the Citizenship Clause. 112 U.S. 94, 109 (1884). The real reason is clear: the requisite

consent "to the jurisdiction thereof" was lacking under the Citizenship Clause. U.S. Const. Amend. XIV.

This Court's teachings on revocation of citizenship illustrate how essential consent is, and how irrational automatic citizenship based on location of birth would be. *Afroyim v. Rusk*, 387 U.S. 253 (1967) In *Afroyim*, this Court held that revocation of citizenship must be consensual rather than by ascription, using logic that applies with equal force to the granting of citizenship. "We reject the idea . . . that . . . Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot . . . be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs." *Id.* at 257. All nine Justices in that split decision implicitly embraced the consensual underpinnings of citizenship. Citizenship lacks meaning without consent, and there is no principle supporting birthright citizenship.

III. BIRTHRIGHT CITIZENSHIP FOR FOREIGNERS WOULD HAVE ENORMOUSLY ADVERSE CONSEQUENCES.

The large and growing population of illegal aliens and even foreign visitors amplifies the significance of birthright citizenship. By the government's own estimates, in January 2000 there were seven million illegal aliens living in the United States. "Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000," Office of Policy and Planning, U.S. Immigration and Naturalization Service 1 (2003).[3] The number is surely even higher today, as illegal immigration is continuing to accelerate. In a mere six years, from 1994 to 2000, gov-

[3] http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf

ernment estimates of the numbers of illegal aliens nearly doubled. See U.S. General Accounting Office, Illegal Aliens: National Net Cost Estimates Vary Widely 4 (1995) (estimating illegal alien population at four million in 1994).

"We have noted before the dimensions of the immigration problem in this country," Justice Powell wrote twenty years ago. *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 222 (1984) (Powell, J., concurring) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) and *United States v. Martinez-Fuerte* 428 U.S. 543, 551-53 (1976)). "Recent estimates of the number of illegal aliens in this country range between 2 and 12 million, although the consensus appears to be that the number at any one time is between 3 and 6 million. One of the main reasons they come—perhaps *the* main reason—is to seek employment." 466 U.S. at 222 (footnote omitted). If birthright citizenship implicitly becomes a constitutional requirement here, then the problems will greatly multiply. It would create an unprecedented incentive to break the law. The Constitution should not be construed to induce lawlessness.

Nor should an easily manipulated fact—place of birth—take precedence over the substantive values inherent in citizenship. Non-citizens owing allegiance to foreign powers should not have a right to endow their children with citizenship simply by crossing our border to give birth. "Gabriela Nicolas felt her first contractions while at a downtown San Diego movie theater. She could have easily rushed home to Tijuana, Mexico. But that wasn't the plan. She drove to a hospital in a San Diego suburb, where she gave birth to Miguel Angel about 12 hours later." Anna Gorman, "Crossing border for birth rights; Parents pursue U.S. citizenship," *Chicago Tribune*, April 30, 2003, 3A. Why? "By being born in the United States, Miguel has something that his parents don't: American citizenship. 'I wanted him to have more choices,' said Nicolas, a

psychologist who also had her first child in the United States. Women have long been crossing the border from Mexico to give birth, pursuing the age-old yearning of parents everywhere to give their children better lives." *Id.*

Mexico is just of one of many countries from which visitors now come to claim birthright citizenship. "Women from Mexico are not the only foreigners coming to the United States to give birth. Although there are no solid figures, expectant mothers routinely obtain tourist visas and travel to America from as far away as Hong Kong and Korea." *Id.* Indeed, "[a]n entire cottage industry now caters to people from South Korea, China, the Middle East and elsewhere who visit the United States just to give birth and then go back home. Once the child reaches 21, he can petition to have his families outside the country join him legally in the United States. These children are called 'anchor babies.'" "Immigration: Stop the Abuse," *Florida Times-Union (Jacksonville, Fla.)*, April 4, 2003, at B-4. The overall numbers are largely unknown, but some estimates are that anchor babies exceed 200,000 each year. This website even promotes travel to the United States by Koreans to give birth to American citizens: http://www.birthinusa.com.

The Constitution surely does not require allowing this exploitation by foreigners who reject American sovereignty. The Fourteenth Amendment does not mandate this disdain of the legal procedures for immigrating to this country. England changed its rule enabling birthright citizenship nearly twenty years ago. *See* British Nationality Act 1981, ch. 61, 1(1) (Eng.) (limiting citizenship to offspring of citizens and of aliens in the United Kingdom who have legally settled there). England does not grant citizenship to the offspring of non-settled or illegal aliens who do not spend the first ten years of their lives there, as Hamdi apparently did not spend here. *Id.* 1(4). A claim for constitutional birthright citizenship cannot

rest on English law when that country has itself so clearly rejected the notion.

The costs of birthright citizenship would be staggering. Already, California medical programs pay an estimated $852 million annually to cover illegal aliens. *Clayworth v. Bonta*, 295 F. Supp. 2d 1110, 1114 n.1 (E.D. Cal. 2003). Granting constitutional protection for birthright citizenship would accelerate the fiscal hemorrhaging. It would render the federal government powerless to stem the tide of illegal immigration and its staggering costs. Riee University economist Dr. Donald Huddle estimated that illegal aliens cost $5.4 billion in public assistance—back in 1990. Shari B. Fallek, "Comment: Health Care for Illegal Aliens: Why It Is a Necessity," 19 Houston J. Int'l L. 951, 957 (Spring 1997). "For the decade from 1993 to 2002, he estimated that the net cost for illegal immigrants would be $186.4 billion. Between 1993 and 2002, illegal immigrants will cost $221.5 billion in public assistance and displacement costs. Regarding jobs, Dr. Huddle suggested that in 1992, 2.07 million U.S. workers were displaced from jobs by immigrants, which cost $11.9 billion. He estimated the cost of job displacement for the 1993-2002 decade to be $171.5 billion." *Id.* 957-58.

It would be an absurd triumph of form over substance to require citizenship to be beholden entirely to the place of birth. In an increasingly mobile society, the location of birth conveys nothing about the desire of the sovereign to grant citizenship and little about the person. A constitutional amendment is not necessary to adhere to principles of citizenship existing from the days of the Roman Empire: a set of obligations and rights conferred by a people upon those whom a sovereign chooses. Citizenship must not be manipulated based on a travel itinerary; rather, it is a function of consent between the sovereign and the subjects.

CONCLUSION

"Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good." *Morrison v. California*, 291 U.S. 82, 89 (1934). Hamdi's petition should be denied for lack of proof of citizenship.

Respectfully submitted,

ANDREW SCHLAFLY
521 Fifth Ave. - 17th Floor
New York, NY 10175
(212) 292-4510

KAREN B. TRIPP *
2245 Shakespeare Road
Houston, TX 77030
(713) 658-9323

* Counsel of Record

Counsel for Amicus

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IN THE

Supreme Court of the United States

YASER ESAM HAMDI, ET AL.,

Petitioners,

v.

DONALD RUMSFELD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CITIZENS FOR THE COMMON DEFENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ADAM H. CHARNES
Counsel of Record
JAMES J. HEFFERAN, JR.
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

Counsel for Amicus Curiae

March 29, 2004

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for the Common Defence ("CCD") is an association that advocates a conception of robust Executive Branch authority to meet the national security threats that confront the nation in its war against international terrorists. The organization's name derives from the Preamble to the Constitution, which recognizes that "to provide for the common defence" against foreign threats is one of the great objects of government our Constitution was meant to secure. Far from being inconsistent with "secur[ing] the Blessings of Liberty to ourselves and our Posterity," the vigorous executive power necessary to defend our nation against foreign enemies was seen by the Framers as a vital precondition to securing those blessings and an integral part of the same libertarian enterprise.

CCD's members are lawyers and law professors from across the country, most of whom served as law clerks to federal court judges or Justices of this Court, and/or as executive branch officials in the current or past Administrations. A partial list of CCD's members is included as Appendix A to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States responded to al Qaeda's attacks of September 11, 2001 by dispatching thousands of soldiers to Afghanistan to eliminate the organization's infrastructure in that country and the Taliban regime that was allied with and supported al Qaeda. During the course of these hostilities,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

petitioner Yaser Esam Hamdi ("Hamdi") was captured on an active battlefield by military forces of the Northern Alliance, who were our allies, possessing a Kalishnikov assault rifle and fighting or preparing to fight for our enemies, the Taliban. The Northern Alliance then turned Hamdi over to United States military forces. Defense Department officials thereafter reviewed and affirmed the propriety of his continued detention. (J.A. 148-50.)

Petitioners have written their legal arguments as if these events never happened. Shorn of its statement of facts, a reader of petitioners' brief would be excused for believing that Hamdi was an ordinary American civilian, plucked off the streets of an American city far from the battlefield and jailed arbitrarily in a military prison. The briefs of petitioners and their *amici*, therefore, are permeated with a fundamental error—they fail to recognize, let alone address, the constitutional implications of the fact that Hamdi neither was charged with a civilian crime in an American courtroom nor is a civilian non-combatant detained by military or civilian authorities. Rather, Hamdi—although he now claims the protections of United States citizenship by accident of birth—was a soldier for an enemy of this nation captured during wartime on a foreign battlefield while carrying a military assault rifle that he intended to use to kill other U.S. citizens who served as soldiers in our armed forces.

Ignoring the context of Hamdi's detention, petitioners seek from this Court a truly unprecedented ruling: That, during time of war, a habeas court can second-guess the military judgment of soldiers serving in the United States armed forces during actual combat on an active battlefield thousands of miles from the United States. In seeking this highly intrusive interference with the President's authority under the Commander-in-Chief Clause of Article II of the Constitution, petitioners and their *amici* rely *exclusively* on cases that are wholly inapposite—cases addressing the constitutional rights of citizens held by *civilian* authorities and charged with

criminal offenses, and cases addressing the authority of the military to detain and prosecute *non-belligerents*. Petitioners and their *amici* simply fail to explain why these precedents limit the well-settled authority of the government under the laws of war to undertake the non-criminal detention of an actual combatant during hostilities, and to continue such detention at least until the conclusion of hostilities. Nor do they mention, much less distinguish, the many cases holding that the laws of war apply with equal force to citizens and aliens alike. In short, Hamdi's detention must be measured against the President's authority under the Commander-in-Chief Clause, not his power as chief domestic law enforcement officer.

The practical consequences of this Court's acceptance of petitioners' contrary arguments cannot be overstated, for they seek to impose on soldiers on the battlefield—for the first time in history—the obligation to provide enemy belligerents who are citizens with the full plethora of rights due to criminal defendants under the Fifth and Sixth Amendments. Moreover, they insist that soldiers defend their actions taken under fire in a civilian courtroom, thousands of miles from the battlefield, upon the same demands of proof and subject to the same evidentiary rules as apply to the neighborhood police officer. Acceptance of petitioners' arguments would destroy the essential intelligence value of captured enemy combatants who are citizens, thereby endangering the lives of soldiers on the battlefield and citizens in our cities. And their arguments would impose substantial new burdens on battlefield soldiers that would reduce the effectiveness of America's military and thus the safety and security of the American people.

With respect to detention of an enemy belligerent who is a citizen and is captured on a foreign battlefield, the laws of war, constitutional doctrine, and this nation's history are all clear: The military, exercising the President's authority under the Constitution, can detain him at least until the end of

hostilities; and a habeas court fulfills its duty under the Due Process Clause to act as a check on Executive arbitrariness by reviewing the evidence on which the military based its detention decision. Judicial inquiry under the Due Process Clause, appropriately delimited by the interests implicated in particular cases, ensures that the government acts in good faith and limits the potential for overbroad action. But trial-type procedures are not appropriate when the indicia of arbitrariness and oppression are non-existent and the consequences of judicial intervention dire. The Court has previously recognized that due process permits, and Article II compels, substantial deference to military decisionmaking, and it should defer here as well.[2]

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[2] *Amicus* submits that the arguments set forth in this brief generally apply as well in *Rumsfeld* v. *Padilla*, No. 03-1027. To be sure, in that case respondent Jose Padilla was not captured on a foreign battlefield. But the Executive's authority to detain enemy belligerents is not limited by geography, see *Ex parte Quirin*, 317 U.S. 1 (1942), and the laws of war permit the military to detain enemy combatants—for example, spies and saboteurs—captured behind its own lines. See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 769 (2d ed. 1896); Knut Ipsen, *Combatants and Non-Combatants, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 98 (Dieter Fleck ed., 1995). The nature of Padilla's combat role and the circumstances of his capture, however, may require the government to provide a more detailed factual proffer to a habeas court than with respect to Hamdi, and indeed the Mobbs Declaration submitted in *Padilla* is significantly more detailed than that in this case. Moreover, the government engaged in a substantial and detailed decisionmaking process before determining that Padilla was an enemy belligerent. See 150 CONG. REC. S2701 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004, remarks by Alberto R. Gonzales before the American Bar Association Standing Committee on Law and National Security). Just as the judiciary lacks institutional competence to second-guess battlefield decisions by military commanders, see *infra*, at 25, so too should it defer to the expertise of, and the information available to, the expert decisionmakers in *Padilla*. And the personal involvement of the President in classifying Padilla as an enemy combatant provides a stronger separation-of-powers mandate for deference to that decision. See *Dalton* v. *Specter*, 511 U.S. 462, 474-77 (1994); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 44 (1849).

ARGUMENT

I. THE EXECUTIVE POSSESSES AUTHORITY TO DETAIN HAMDI AS AN ENEMY COMBATANT.

Petitioners argue that the Executive lacks authority to detain a citizen as an enemy combatant through the conclusion of hostilities—and indeed lacks the authority to detain such a person *at all* "[o]utside of the area of actual fighting."[3] (Pet. Br. 28-35.) These arguments ignore this Court's precedents, the laws of war, our nation's history, and Congress' authorization of such detention.

A. The President's Inherent Powers As Commander In Chief Authorize The Executive's Detention Of Hamdi.

1. Article II of the Constitution provides: "The President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2, cl. 1. "The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & S. Air Lines*, 333 U.S. at 109. Thus, the Constitution gives the President "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its

[3] Petitioners' apparent concession that the military may detain enemy belligerents in an "area of actual fighting" means less than it first appears, for they rely only on general principles applicable to the military's authority over all citizens, even loyal civilians. (Pet. Br. 30.) Even on the battlefield itself, therefore, petitioners remarkably refuse to concede that there are *any* legal implications arising from Hamdi's belligerency.

exercise an act of Congress . . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Petitioners concede that the Commander-in-Chief Clause "necessarily entails plenary executive authority in areas of actual fighting," but claim that this authority is "only temporary" and evaporates once "the citizen is removed from the area of actual fighting."[4] (Pet. Br. 28-29.) The text and history of the Commander-in-Chief Clause provide no support for this proposition. The President's power to detain enemy belligerents lies at the core of his "purely military" authority to "employ [military forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). As one treatise discussed shortly after the Civil War, with specific reference to that conflict:

> The framers of the Constitution having given to the commander-in-chief the full control of the army when in active service, subject only to the articles of war, have therefore given him the full powers of capture and arrest of enemies, and have placed upon him the corresponding obligation to use any and all such powers as may be proper to insure the success of our arms. To carry on war without the power of capturing or arresting enemies would be impossible. We should not, therefore, expect to find in the Constitution a provision which would deprive the country of any means of self-defence in time of unusual public danger.

WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 173 (43d ed. 1871). See also *id.* at 83.

Moreover, the detention of enemy belligerents is an ordinary and universally recognized incident of the power to wage war. Under the laws of war, enemy combatants who are captured may be detained at least until after cessation of active hostilities. See Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, arts. 21 and 118, 6 U.S.T. 3316, 3334, 3406, 75 U.N.T.S. 135, 152, 224; HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 417-21 (1978). Even civilians may be detained until the end of the conflict if they engage in hostile activities. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"), Aug. 12, 1949, art. 5, 6 U.S.T. 3516, 3520-22, 75 U.N.T.S. 287, 290-92; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 512-14 (2003). Importantly, the Geneva Conventions provide no exemption from detention as a belligerent for citizens of the detaining power who fight for the enemy.[5] See LEVIE, *supra*, at 74-76; Susan

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[4] The Second Circuit in *Padilla* erred in holding that the Commander-in-Chief Clause makes an exception to the President's inherent authority for enemy belligerents detained "on American soil outside a zone of combat." *Padilla* v. *Rumsfeld*, 352 F.3d 695, 712-18 (2d Cir. 2003), *cert. granted*, No. 03-1027. Courts are ill-equipped to make the judgment whether particular territory is within the "zone of combat." See *infra*, at 25. Moreover, quite obviously, al Qaeda considers American cities and airports part of the battlefield. Cf. *United States ex rel. Wessels* v. *McDonald*, 265 F. 754, 763-64 (E.D.N.Y. 1920) (in World War I, the port of New York, and indeed "the territory of the United States," was within "the field of active operations").

[5] Petitioners' *amici* concede that Hamdi's U.S. citizenship does not exempt him from detention as a combatant. See Brief of *Amici Curiae* Experts on the Law of War in Support of Petitioners ("Law of War Experts Brief") at 28 n.22. The government has designated Hamdi an unlawful combatant. Cf. Brief *Amici Curiae* of Law Professors, Former Legal Advisers of the Department of State, *et al.* ("Law Professors *Rasul* Brief") at 10-14, *Rasul* v. *United States* (Nos. 03-334, 03-343) (demonstrating that Taliban fighters are unlawful combatants); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335 (2002) (same). The Court need not decide whether this designation is correct because Hamdi may be detained no matter whether

Elman, *Prisoners of War under the Geneva Convention*, 18 INT'L & COMP. L.Q. 178, 180-82 (1969). Neither petitioners nor their *amici* have cited any authority for the remarkable proposition that the Framers of our Constitution intended to allow the President to authorize the military on the battlefield to kill citizens fighting for the enemy, but not detain them as enemy belligerents under the laws of war.[6]

Under the laws of war, "captivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'" Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (quoting *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 229 (1947)). Internment of enemy belligerents is a non-punitive, regulatory detention that comports with substantive due process if not "excessive in relation to the regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 746-47 (1987). Such detention readily satisfies that standard. See *id.* at 748 ("[I]n times of

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he is a prisoner of war, an unlawful combatant entitled to the protections accorded civilians under Geneva IV, or an unlawful combatant not entitled to the protections of the Geneva Conventions at all. At the end of hostilities, if he is a prisoner of war he must be repatriated; if he is an unlawful combatant he can be tried for not only any war crimes he committed, but also his "mere participation in hostilities." Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 70-71 (2003).

[6] Cf. *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909); Elman, *supra*, at 181 ("'[a]ll persons whom a belligerent may kill become his prisoners of war on surrendering or being captured.'"). Petitioners' argument that the Executive's authority to detain is limited to the battlefield is inconsistent with the GPW, which requires the detaining power, "as soon as possible after their capture," to remove enemy soldiers from the "combat zone." GPW art. 19, 6 U.S.T. at 3334, 75 U.N.T.S. at 152. Under petitioners' rule, the GPW would undermine itself: It would require that detainees be moved to a location that would entitle them to rights beyond those it mandates.

war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous."); *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); Brief of Citizens for the Common Defence as *Amicus Curiae* in Support of Respondents ("CCD *Rasul* Brief") at 16-20, *Rasul* v. *United States* (Nos. 03-334, 03-343).

2. Petitioners' claim that the Constitution bars outright the military detention of enemy belligerent citizens off the battlefield—*i.e.*, that citizens are entitled to an exemption from the ordinary principles regarding the detention of enemy belligerents—is flatly inconsistent with this nation's history.[7] The courts, the Executive Branch, and Congress all have recognized that the military can detain a U.S. citizen who is an enemy soldier.[8] The permissibility of military detention of U.S. citizens for engaging in combat against this country was recognized by the Pennsylvania Supreme Court before adoption of the Constitution. See *Respublica* v. *Chapman*, 1 U.S. (1 Dall.) 53 (Pa. 1781) (holding that a person born and residing in Pennsylvania could not be prosecuted for treason for conduct that pre-dated the formation of the state government, but could be held as a prisoner of war). In *Ex*

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[7] International practice similarly demonstrates no exemption from detention for citizens of the detaining power. See Elman, *supra*, at 182 (during the Boer War, Irish soldiers who fought for the Boers were detained as enemy belligerents by the British).

[8] That the government might have charged Hamdi with civilian crimes is beside the point. The Executive has unreviewable discretion to choose whether to apply criminal law or exercise its rights as a belligerent. *The Prize Cases*, 67 U.S. (2 Black) 635, 673 (1862). See also *id.* at 670 (rejecting the argument that Confederates "are not enemies because they are traitors"). During wartime, with respect to citizens who are enemies, "[t]hey [the United States] could act both as belligerent and sovereign," and could take either belligerent or sovereign acts "when, where, and as they chose. It was a matter entirely within their sovereign discretion." *Lamar* v. *Browne*, 92 U.S. 187, 195 (1875).

parte Quirin, 317 U.S. 1 (1942), this Court held that "[c]itizenship in the United States of an enemy belligerent" does not exempt him from detention by the military under the laws of war, including even the jurisdiction of a military tribunal to try and execute him for war crimes.[9] *Id.* at 37-38.

Other courts have agreed. In *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946), the court rejected a habeas challenge by a U.S. citizen who fought in the Italian army and was detained as a prisoner of war, holding that his citizenship did not provide an exemption to the laws of war. In *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), the Tenth Circuit rejected the habeas petition of a U.S. citizen convicted by a military commission of spying for Germany during World War II, noting that "the petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war." See also *Johnson* v. *Jones*, 44 Ill. 142, 154 (1867).

Our nation's military history is wholly consistent with these cases. During the Civil War, the United States military detained over 200,000 United States citizens as prisoners of

[9] Petitioners are incorrect in referring to this passage as "dictum." (Pet. Br. 36, 37.) One of the *Quirin* petitioners claimed U.S. citizenship, so it was necessary for the Court to decide whether he was entitled to any additional procedures by virtue of that citizenship. Moreover, petitioners (Pet. Br. 12) and the Second Circuit, *Padilla*, 352 F.3d at 715-16, err in claiming that the congressional authorization that was present in *Quirin* does not exist here. For congressional authorization, the *Quirin* Court relied on Article 15 of the Articles of War, see 317 U.S. at 27-28, which is now codified as Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. See Wedgwood, *supra* note 5, at 334. Finally, the Second Circuit also erred in suggesting that the petitioners in *Quirin* conceded that they were belligerents. *Padilla*, 352 F.3d at 716. In fact, as their counsel stated at oral argument in this Court, "some of them . . . maintained they had joined the mission to escape Nazi Germany and had no intention of committing sabotage or actions of violence." See David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 70 (1996).

war.[10] Moreover, over 2,000 other citizens who, in fighting for the Confederacy, violated the laws of war were detained, tried, and punished by the military as unlawful combatants—all without the protections of the Fifth and Sixth Amendments. See, *e.g.*, WINTHROP, *supra* note 2, at 783-84; Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 43. A notable example was the military prosecution of T.E. Hogg and associates, who (in circumstances reminiscent of the events of September 11, 2001) boarded a U.S. merchant steamer in Panama wearing civilian clothes with the intent of seizing the ship for the Confederacy. See Gen. Orders No. 52 (Hdqtrs. Dep't of the Pacific 1865), *reprinted in* 8 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series II, at 674 (1899). The reviewing authority, Major-General McDowell, denied the defendants' claims for a right to trial by jury under the Constitution because they were "belligerent enemies to the United States." *Id.* at 677.

Indeed, Congress itself has explicitly subjected U.S. citizens who are *civilian non-combatants* to military detention and trial. Since before this nation's independence, civilians who aid the enemy have been subject to military punishment, now pursuant to Article 104 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 904. See Edmund M.

[10] See William B. Hesseltine, *Civil War Prisons—Introduction*, *in* CIVIL WAR PRISONS 5, 6 (William B. Hesseltine ed., 1972). Although the United States accorded to Confederate soldiers the status of prisoners of war, it did not recognize the Confederacy as a separate nation, and it therefore considered and treated Confederate soldiers as disloyal United States citizens who remained subject to prosecution for treason. See Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 114-15 (2000); U.S. Dep't of War, Gen. Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, arts. 152-54, *reprinted in* LIEBER'S CODE AND THE LAW OF WAR 45, 70-71 (Richard Shelly Hartigan ed., 1983).

Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 MINN. L. REV. 79, 97-107 (1920). Citizens who spy for the enemy during war are also triable by military commission for violation of Article 106 of the UCMJ, 10 U.S.C. § 906. See WINTHROP, *supra* note 2, at 766; Morgan, *supra*, at 111-12. If the government can constitutionally punish a citizen who is a non-combatant in these circumstances, *a fortiori* it can detain a citizen who has taken up arms against this country.[11]

3. This Court consistently has held, in contexts other than detention of a combatant, that citizens are *not* exempt from the ordinary laws of war. For example, in *Miller* v. *United States*, 78 U.S. 268 (1870), the Court upheld, against constitutional challenge by a citizen, exercise by Congress during the Civil War of "an undoubted belligerent right" to seize property of the enemy, in this case stock certificates located in and held by a citizen of the United States. *Id.* at 304-07. See also *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 305-06 (1909) (property owned by a citizen located in enemy territory during the Spanish-American War was subject to seizure or destruction by the military); *The Venus*, 12 U.S. (8 Cranch) 253, 288 (1814) (opinion of Marshall, C.J.) ("a hostile character [attaches] to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy"). In *Brown* v. *Hiatts*, 82 U.S. (15 Wall.) 177 (1872), the Court held that, since inhabitants of the Confederacy were in enemy territory,

[11] See also Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470, 471-72 (1871) (citizens who provided hostile Indians with ammunition were subject to military detention and "trial and punishment by court-martial"); Military Commissions, 11 Op. Att'y Gen. 297, 315 (1865) (if a citizen "is an active participant in the hostilities, it is the duty of the military to take him a prisoner without warrant or other judicial process, and dispose of him as the laws of war direct").

under the laws of war the courts of the United States were closed to them. *Id.* at 184. See also WHITING, *supra*, at 342

4. Each of the cases on which petitioners place heavy reliance in support of their claim that the Executive lacks authority over combatants outside of the battlefield addresses the detention of non-belligerents. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), for example, which was limited to its facts by *Quirin*, 317 U.S. at 45, was based on the Court's conclusion that, because Milligan was not "part of or associated with the armed forces of the enemy," he "was a non-belligerent, not subject to the law of war." *Id.* In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), this Court noted that "[o]ur question does not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war." *Id.* at 313-14. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court specifically relied on the fact that Endo, a concededly loyal Japanese-American, was detained by "a civilian agency, . . . not by the military," and noted "that we do not have here a question such as was presented in *Ex parte Milligan* or in *Ex parte Quirin*, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in habeas corpus proceedings." *Id.* at 297-98 (citations omitted). *Endo* was, in any event, decided on *statutory*, not constitutional, grounds. *Id.* at 300-04. *Reid* v. *Covert*, 354 U.S. 1 (1957), held only that courts-martial lacked jurisdiction, during times of peace, over civilian (non-belligerent) dependents of service members, and specifically distinguished crimes committed in areas of "active hostilities." *Id.* at 33-34 (plurality opinion). Finally, *In re Stacy*, 10 Johns. 328 (N.Y. 1813), dealt with a citizen who was charged with treason, a civilian crime, before a court-martial; the court specifically based its decision on the fact that "[a] military commander is here assuming criminal jurisdiction over a private citizen." *Id.* at 334.

The cases involving the law of prize and the Captured and Abandoned Property Act (Pet. Br. 27) are likewise unhelpful to petitioners. The inquiries made by a court sitting in prize, which usually occurred *after* the end of hostilities, were in fact quite narrow and deferential to the government. The government's libel need not have explained why the ship had been seized or became a prize of war; it must only have alleged generally the capture of the vessel as a prize of war. See *The Andromeda*, 69 U.S. (2 Wall.) 481, 490 (1864). If the vessel's claimants contested the libel, they were allowed to present evidence only in the form of papers from the vessel and test oaths from the crew. See *The George*, 14 U.S. (1 Wheat.) 408, 409 (1816). "If the captured vessel be plainly an enemy, immediate condemnation is certain and proper." *Id.* In addition to the extremely limited evidence permitted, moreover, the inquiry was substantially less intrusive than a trial-type habeas hearing because the ship, its crew, and those capturing it were already in port, near the courthouse. Similarly, contrary to petitioners' suggestion, Captured and Abandoned Property Act cases did not involve judicial review of the "propriety of military seizures" of property. (Pet. Br. 27.) Indeed, the Court recognized that the seizures were permitted under the laws of war because "property found in enemy territory is enemy property, without regard to the *status* of the owner. In war, all residents of enemy country are enemies." *Lamar* v. *Browne*, 92 U.S. 187, 194 (1875) (emphasis in original). Rather, judicial involvement was based on a statute enacted by Congress to make war more "humane" by providing reimbursement to loyal owners of property. *Id.* at 194-96.

In short, *none* of these cases, nor the others cited by petitioners, has any relevance to the detention by the military of an enemy belligerent.

B. Congress Authorized The Executive To Detain Hamdi.

Petitioners assert that a provision of the federal criminal code, 18 U.S.C. § 4001(a), bars the President from detaining Hamdi "[o]utside of the area of actual fighting." (Pet. Br. 30, 37.) They are wrong, for Congress intended this provision to prohibit the use of detention camps such as those used during World War II to detain loyal citizens of Japanese descent. There is no indication in § 4001(a)'s legislative history that it was intended to override the Executive's traditional authority to detain enemy belligerents captured on a foreign battlefield.[12] When Congress enacted § 4001(a) it surely knew of historical examples of U.S. citizens who had been soldiers fighting against this country. It therefore would be illogical to assume that Congress *sub silentio* intended to overrule centuries of precedent and history with respect to detention of belligerents when it specifically addressed the Japanese internment. Moreover, there simply is no textual support in § 4001(a)'s language for petitioners' distinction between the detention of belligerents on and off the battlefield; the statute, if applicable, speaks without exception.

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[12] See Brief for the Petitioner at 44-49, *Rumsfeld* v. *Padilla* (No. 03-1027); Brief for United States Senators John Cornyn and Larry E. Craig as *Amicus Curiae* at 21-30. The Second Circuit in *Padilla*—based solely on floor statements of individual members—concluded that § 4001(a) was intended to apply "during war and other times of national crisis." 352 F.3d at 718-20. But that conclusion says nothing about whether Congress intended it to apply to detentions by the *military* of *enemy belligerents*. Nothing in the House Report, see H.R. REP. NO. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435—which the *Padilla* court did not even discuss—even remotely supports the Second Circuit's holding, and individual members' statements cannot bear the weight the Second Circuit put on them. See *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972).

In any event, Congress authorized detentions such as that of Hamdi in at least three separate ways. *First*, on September 18, 2001, Congress authorized the President "to use *all* necessary and appropriate force against those nations, organizations, or *persons*" involved with September 11, including those who (like the Taliban) "harbored such organizations." Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (emphasis added). There can be no serious argument that the AUMF did not authorize the military to kill Hamdi as he fought for the Taliban. But the authority to kill enemy soldiers necessarily includes the power to capture them, and "force" includes the power to detain. See *supra*, at 8 & n.6.

Second, treaties ratified by the Senate are "the supreme Law of the Land." U.S. CONST. art. VI, § 2. As explained above, the GPW specifically authorizes the detention, at least until the end of hostilities, of an enemy belligerent, and contains no exemption for citizens of the detaining power. Recognizing the congressional authorization embodied in ratification of the GPW, where in accord with Executive action, would be entirely consistent with the separation-of-powers concerns animating *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Third, precedent requires this Court to conclude that 10 U.S.C. § 956(5) authorizes the detention of enemy belligerents. That statute, in addition to appropriating funds, authorizes the Secretary of Defense to prescribe regulations for the "maintenance, pay, and allowances of prisoners of war" and others in "similar" "status."[13] 10 U.S.C. § 956(5). In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall interpreted an "act for the safe keeping

[13] The Second Circuit therefore clearly erred in stating that "Section 965(5) authorizes nothing beyond the expenditure of money." *Padilla*, 352 F.3d at 724.

and accommodation of prisoners of war"—which authorized the President to "make such regulations and arrangements . . . as he may deem expedient" for prisoners of war and also appropriated funds for this purpose, see 2 Stat. 777 (1812)—as being a substantive grant of authority to the President which gave him "very great discretionary powers respecting their persons." 12 U.S. (8 Cranch) at 126. *Brown* applies fully to § 956(5).

II. UNDER SETTLED DUE PROCESS PRINCIPLES, HAMDI RECEIVED ALL THE PROCESS THAT HE IS DUE.

The Due Process Clause plays a central and essential role in preventing arbitrary Executive action, including arbitrary detentions. The history of the Clause, and its derivation from Magna Carta, testify to its function as an essential bulwark of liberty. Thus, *amicus* agrees that the Clause, via the writ of habeas corpus, requires the courts to review Executive detentions of U.S. citizens to guard against arbitrariness and oppression.

This Court has long recognized, however, that due process is a flexible concept that "depends on [the] circumstances." *Moyer* v. *Peabody*, 212 U.S. 78, 84 (1909). This Court has never held that due process, as enforced via the writ of habeas corpus, requires in every circumstance the trial-type hearing applicable in a collateral attack of a criminal conviction. See, *e.g.*, *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). Searching habeas review is simply an unnecessary and constitutionally inappropriate effort to intrude into core Article II Executive war powers—and would impose severe costs in terms of military effectiveness and national security—where the habeas petitioner was detained as an enemy belligerent on a foreign battlefield, the number of citizens detained is small, and there are no indicia of bad faith evident from the circumstances of the detainee's capture

or detention.[14] In such circumstances, due process is satisfied when the government describes, under oath and for the court's review, (1) the facts establishing that that the citizen-detainee was captured on or near a foreign battlefield and (2) the basis for the military's considered professional judgment that the detainee was an enemy belligerent. Because the Mobbs Declaration satisfies this standard, Hamdi received all the process that was due him under the Constitution.[15]

The circumstances of Hamdi's detention counsel powerfully for a restrained judicial role in reviewing the military's professional judgment that Hamdi was an enemy belligerent. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Sec'y of State*, 378 U.S. 500, 509 (1964)). Although the government concedes that the federal courts have jurisdiction to entertain petitioners' habeas petition, the context here of a battlefield detention of an enemy combatant infuses the constitutional analysis. In the ordinary context, the Due Process Clause seeks, after

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[14] As noted above, see note 2, *supra*, when an enemy belligerent is captured outside of a foreign battlefield, due process may require the government to provide a somewhat more detailed explanation of the circumstances of the citizen's detention and justification for the conclusion that he is an enemy combatant. The ultimate purpose of the due process review, however, remains the same: for the government to provide sufficient evidence for a judicial check against Executive arbitrariness, not for courts to conduct trial-type hearings in order to second-guess military or intelligence decisions.

[15] The cases on which petitioners rely are not to the contrary. (Pet. Br. 16-17, 19-21.) None involved battlefield detentions of enemy soldiers. Cases involving criminal defendants, deportable aliens, and property deprivation—all within the United States, all unrelated to a hostile foreign power, all unconnected to war—involve substantially different considerations, including a dramatically weaker governmental interest. See CCD *Rasul* Brief, *supra*, at 16-20.

weighing the costs of judicial intervention, to reduce the risk of erroneous decisions that deprive the innocent of life, liberty, or property. See *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979). But error—and severe deprivations of life, liberty, or property otherwise imposed on innocents—inevitably permeates the conduct of war. See CCD *Rasul* Brief, *supra*, at 16-18. Thus, any effort to apply due process principles applicable to criminal prosecutions or property deprivations, rather than those that apply in the context of war, will severely impair military effectiveness. See WHITING, *supra*, at 177. At the same time, the fact that Hamdi was detained on a foreign battlefield, and that the determination of his status as an enemy belligerent was made on that battlefield by the military, not by political officials, provides powerful reassurance that searching judicial review is not required to avoid oppression and arbitrariness by the Executive.

As explained below, under applicable laws of war, a non-citizen detained on the battlefield is entitled to *no process at all*—neither a hearing nor counsel—to challenge the detaining power's determination that he is an enemy belligerent. Moreover, separation-of-powers principles mandate judicial deference to the military's battlefield judgment about a citizen-detainee's belligerency. Indeed, this Court has repeatedly circumscribed the scope of habeas review of military decisions. Providing oversight beyond review of the Mobbs Declaration, particularly the trial-type hearing sought by petitioners and the extensive procedures ordered by the district court, is inconsistent with the proper judicial role, dangerous to national security, and in all events unnecessary to safeguard the liberty of the American people against arbitrary detention.

A. The Laws Of War, The Separation Of Powers, And Precedent All Require Deferential Review Of The Military's Detention Of Hamdi.

1. Evaluation of petitioners' arguments must begin with the absence of legal authority for providing a captured enemy combatant with *any* judicial forum for challenging the detaining military's determination that he is a belligerent. No court has ever held that a prisoner of war or other detained combatant has the right to any process to prove his non-belligerency, or that, contrary to their express text, the Fifth and Sixth Amendments apply to enemy belligerents. See U.S. CONST. amend. V (excepting "cases arising in the land or naval forces"); *id.* amend. VI (applying to "all criminal prosecutions"). In *Colepaugh* v. *Looney,* 235 F.2d 429 (10th Cir. 1956), the Tenth Circuit held that the "matter of fact" whether the habeas petitioner (who was a U.S. citizen tried and convicted by military commission for spying for Nazi Germany) was a combatant was "not within the scope of [the court's] inquiry" upon habeas review. *Id.* at 432.

The laws of war likewise provide no procedure for a detainee to challenge the military's belligerency determination.[16] The GPW—the culmination of an exhaustive process to protect the rights of combatants

[16] Notably, *amici* "experts on the law of war" do not claim otherwise; their brief does not assert that Hamdi is entitled to a "competent tribunal" in order to litigate his claim to lack of belligerency. See Law of War Experts Brief, *supra* note 5, at 14. Moreover, this Court should reject the efforts of petitioners' *amici* (see Brief of *Amici Curiae* International Law Professors Listed Herein in Support of Petitioners) to convince this Court to use customary international law (based largely on treaties to which the United States is not a party and decisions of "regional human rights courts" to which the United States is not subject) to impose restrictions nowhere expressed in the Constitution, this Court's precedents, Congress' enactments, or treaties ratified by the Senate and enforceable by private parties. See CCD *Rasul* Brief, *supra*, at 28-30; Law Professors *Rasul* Brief, *supra* note 5, at 6-7.

captured by the enemy during wartime and reflecting the consensus view of the laws of war—provides *no forum* for a captured enemy to challenge his status as a belligerent. Article 5 provides:

> Should any doubt arise as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

6 U.S.T. at 3324, 75 U.N.T.S. at 140-42 (emphasis added). The "competent tribunal" envisioned by Article 5 *presumes* that the detainee committed a belligerent act and therefore leaves that determination to the discretion of the detaining power.[17] See Law Professors *Rasul* Brief, *supra* note 5, at 21-22.

Amici "experts on the law of war" err in claiming that the United States violated Article 5 by not empanelling a "competent tribunal" to determine whether Hamdi is entitled to prisoner-of-war status, and that this violation entitles Hamdi to habeas relief. See Law of War Experts Brief, *supra* note 5, at 6-15. See also Pet. Br. 17-18. The text of Article 5 clearly states that a competent tribunal is required *only* "[s]hould any doubt arise" about a detainee's status, a determination that the GPW delegates to the detaining power.[18] Here, after the extensive review afforded Hamdi,

[17] The official commentary on Article 5 likewise contains no indication that detainees are entitled to a hearing to dispute their belligerent status. See INT'L COMM. OF THE RED CROSS, COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 73-78 (Jean S. Pictet & Jean de Preux eds., 1960).

[18] See Law Professors *Rasul* Brief, *supra* note 5, at 21-22. Even critics of the Administration's policies have agreed that the existence of such a

see J.A. 149-50, the military determined that there is no such doubt. Indeed, those procedures themselves exceed the requirements of Article 5, which does not contemplate judicial involvement. In any event, Article 5 is relevant solely to the question whether a detainee is entitled to prisoner-of-war status and therefore the conditions of his confinement; as explained above, the government may detain Hamdi whether or not he is a prisoner of war. See note 5, *supra*.

Finally, whether the government's treatment of Hamdi comports with the GPW is a matter for sovereign-to-sovereign negotiations, not for resolution by a habeas court. See CCD *Rasul* Brief, *supra*, at 21. *Amici* "experts on the law of war" assert that, in denying habeas relief, the Fourth Circuit erred in relying on its conclusion that the GPW is not self-executing because even a non-self-executing treaty provides the "rule of decision" in a habeas proceeding as a result of the reference to treaties in the habeas statute, 28 U.S.C. § 2241(c)(3). See Law of War Experts Brief, *supra* note 5, at 16-20. They are wrong. The courts of appeals have consistently and uniformly held that a treaty that is not self-executing cannot form the basis for habeas relief.[19]

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doubt is determined by the detaining power. See Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1518 (2003) ("If the *United States* has any doubt about whether they are prisoners of war, then it needs to employ competent tribunals to decide whether they are prisoners [of war] or not." (emphasis added)).

[19] See, *e.g.*, *Bannerman* v. *Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang* v. *Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003); *Wesson* v. *U.S. Penitentiary Beaumont, TX.*, 305 F.3d 343, 348 (5th Cir. 2002), *cert. denied*, 537 U.S. 1241 (2003); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), *cert. denied*, 537 U.S. 869 (2002); *Garza* v. *Lappin*, 253 F.3d 918, 924 (7th Cir.), *cert. denied*, 533 U.S. 924 (2001).

2. Separation-of-powers principles likewise dictate that courts should act as a check on Executive arbitrariness only by requiring production of, and reviewing, evidence supporting the military's battlefield determination that a citizen was an enemy belligerent. This Court has explained that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). See also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952). The Executive's decisions involving the war power are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines*, 333 U.S. at 111.

Indeed, this Court already has held that the judiciary must defer to the Executive with respect to the very factual determination that petitioners seek to challenge through trial-like procedures. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), this Court stated: "Whether the President in fulfilling his duties, as Commander-in-chief, . . . [chooses] to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670.

This Court has held similarly in analogous contexts. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43 (1849), explained that a President's decision to federalize the state militia to quell a domestic insurrection was judicially unreviewable:

> After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the

people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.

3. As a consequence, where, as here, the military's detention of a citizen is reviewable, this Court nonetheless has mandated substantial deference to the military's determinations. Indeed, there is "a long tradition limiting the scope of habeas corpus inquiry in the military context." Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1039 (1998). For example, the Court has refused to review disputes of fact determined by courts-martial and limited judicial review to a determination of whether the military courts "dealt fully and fairly" with the defendant's claim. See *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Brosius* v. *Warden*, 278 F.3d 239, 243 (3d Cir. 2002). The deference to the military has extended to military jurisdiction over persons not service members. Thus, the Court has held that, in the absence of substantial procedural irregularities, courts should reverse military induction orders only if "there was no evidence to support the order." See *Cox* v. *United States*, 332 U.S. 442, 448-49 (1947); *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). See also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19 (1827). In short, the Court has permitted only limited judicial review of denials of citizens' liberty similar in kind to, and potentially more threatening to life and limb than, that imposed on Hamdi. This judicial deference represents a recognition by the Court that when (as in the habeas statute) Congress does not specifically address the context of military detentions, the traditional Article II

limitations on judicial review of the President's commander-in-chief authority apply.

B. Acceptance Of Petitioners' Arguments Would Interfere Dramatically With National Security.

1. Additional procedures—particularly access to counsel and a right to discovery—would violate separation-of-powers principles, endanger military effectiveness, and create substantial practical problems on the battlefield.[20] *First*, courts are ill-equipped to evaluate battlefield determinations of a detainee's belligerent status, and this Court has repeatedly refused to second-guess the military's battlefield decisions. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than "professional military judgments." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). As Judge Kaufman has explained, "the methods employed in waging war are difficult to sift, *sui generis* in nature and not of a kind ordinarily involved in framing a question for judicial resolution," and the review conducted by the courts therefore should recognize "the difficulty encountered by a domestic judicial tribunal in ascertaining the 'facts' of military decisions exercised thousands of miles from the forum." *DaCosta* v. *Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973). This Court therefore has declined to "second-guess[] military orders" or "require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

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[20] If this Court disagrees with the Fourth Circuit that the submission of the Mobbs Declaration is sufficient to satisfy due process, it should nonetheless reject petitioners' unprecedented demand for a trial-type hearing on Hamdi's status as an enemy belligerent. Rather, the Court should remand the case to permit the district court to consider what additional evidence the government might submit for *ex parte* and *in camera* review.

Second, an evidentiary hearing to second-guess battlefield judgments made by soldiers thousands of miles from the courthouse is highly impractical and burdensome.[21] Soldiers under fire on a foreign battlefield, unlike police officers in our cities, do not maintain records and information so as to ensure admissibility under the Federal Rules of Evidence, and such a requirement may well severely hamper military effectiveness. Such a hearing, moreover, would impose on the military substantial practical costs in terms of gathering and transporting witnesses and evidence from foreign battlefields. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 778-79 (1950); *Reid* v. *Covert*, 354 U.S. 1, 76 n.12 (1957) (Harlan, J., concurring in the result). This Court previously has explained the even more fundamental problems with such a hearing:

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779.

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[21] Such hearings also would pose a substantial threat to the Executive's primacy over foreign relations. For example, during the proceedings below, the district court criticized the Northern Alliance. A judicial decision that our military allies are untrustworthy "warlords" (J.A. 295) could have dramatic consequences for both the success of the war and our nation's diplomatic efforts. Cf. *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

Third, providing an enemy combatant with access to counsel would destroy the utility of an essential military tool—"the tactical military needs of a detaining power to extract from its prisoners vital and life-saving intelligence." Stanley J. Glod & Lawrence J. Smith, *Interrogation under the 1949 Prisoners of War Convention*, 21 MIL. L. REV. 145, 145 (1963). See also J.A. 348 (declaration of Colonel Donald D. Woolfolk) (loss of the ability to interrogate enemy combatants would "crippl[e] the national security of the United States"). Combatants do not have the right to counsel upon capture or even for purposes of the "competent tribunal" to determine whether they are entitled to prisoner-of-war status; they receive counsel only if and when charged with a violation of the laws of war or other crime.[22]

The first piece of advice an enemy belligerent's lawyer inevitably would provide would be to remain silent during interrogation.[23] However, under the laws of war, "[a]ll prisoners of war are subject to interrogation on surrender." PAT REID & MAURICE MICHAEL, PRISONER OF WAR 68 (1984). "Certain prisoners of war . . . may be considered as having important and unique intelligence value, and they will probably be evacuated through special evacuation channels and to special interrogation centers." LEVIE, *supra*, at 109. Interrogation of enemy combatants was extensive during both world wars. See THE OXFORD COMPANION TO WORLD WAR II, at 914-15 (I.C.B. Dear ed., 1995); RICHARD B. SPEED III,

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[22] A detainee receives counsel and extensive procedural rights once he is charged with a war crime, as in *Quirin* and *In re Yamashita*, 327 U.S. 1 (1946). See GPW arts. 99-108, 6 U.S.T. at 3392-3400, 75 U.N.T.S. at 210-18; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[23] Introduction of counsel also would destroy the environment of "dependency and trust" that is needed for successful interrogation. See J.A. 349 (Woolfolk declaration); J.A. 80-81, *Padilla* v. *Rumsfeld*, No. 03-1027 (declaration of the Director of the Defense Intelligence Agency).

PRISONERS, DIPLOMATS, AND THE GREAT WAR 127 (1990). Information from enemy detainees during World War II was invaluable in the Allies' war effort—indeed, it was "the most profitable" source of intelligence. ROBERT R. GLASS & PHILLIP B. DAVIDSON, INTELLIGENCE IS FOR COMMANDERS 21-22 (1948). See also Dep't of the Army, FM 19-40, *Handling Prisoners of War* 17 (Nov. 1952) ("The systematic and methodical interrogation of prisoners of war is one of the most productive sources of intelligence.").

Fourth, petitioners and their *amici* have placed great emphasis on the fact that the Mobbs Declaration is hearsay. These arguments ignore the extensive use of hearsay in similarly important situations. As Judge Hand noted, hearsay is often relied upon by "responsible persons . . . in serious affairs." *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938). This Court specifically approved a death sentence issued by a military commission that was not governed by common law rules of evidence, *Yamashita*, 327 U.S. at 18, 23, and hearsay is used throughout the criminal justice process.[24] The Nuremberg trials also did not bar hearsay.[25] Likewise, the International Criminal Court and current U.N.-sponsored war-crimes tribunals do not operate under strict evidence codes but may

[24] See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975) (probable cause hearings); *Costello* v. *United States*, 350 U.S. 359, 361-64 (1956) (grand juries); *Brinegar* v. *United States*, 338 U.S. 160, 174 n.12 (1949) (application for a warrant).

[25] See Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 53 (1947). The Nuremberg Tribunal held that "[a] fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits," and in post-war war-crimes cases literally thousands of affidavits were admitted in evidence, see HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES 260-62 & n.131 (1993), particularly "if circumstances prevented personal attendance of witnesses whose evidence appeared to be relevant and important." Wright, *supra*, at 53 n.50.

admit any evidence based upon "the probative value of the evidence and any prejudice" that it may cause.[26] Indeed, that the Mobbs Declaration contains hearsay inevitably follows from review of the decision to detain Hamdi by a more detached and senior Executive official—additional review that *decreases* the risks of error, arbitrariness, and abuse.

2. A decision by this Court denying the Executive the authority to detain enemy belligerents who are citizens at least until the end of hostilities would interfere substantially with military effectiveness and thus with overriding national security interests. If petitioners are correct, for example, American soldiers would be required, as they remain under fire, to give *Miranda* warnings to captured enemy belligerents who claimed United States citizenship; and upon the simple invocation of the right to counsel by the detainee, our military would be denied the ability to interrogate him for invaluable intelligence on active military operations of the enemy over the next hill or elsewhere. American military forces, discovering an American enemy combatant with evidence of an imminent terrorist attack on our troops or our cities, would be powerless to interrogate until counsel is provided and a valid waiver of the privilege against self-incrimination is obtained. And this nation's enemies would hardly forego the advantages provided by falsely claiming U.S. citizenship. Indeed, our enemies, aware via the Internet of a decision by this Court applying the protections of the Fifth and Sixth Amendments to enemy citizen belligerents detained on foreign battlefields, may well instruct *all* of their soldiers, whether U.S. citizens or not, falsely to claim American

[26] Rome Statute of the International Criminal Court, art. 69(4), U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002. See also Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 92 (1997) (war crimes tribunals for Yugoslavia and Rwanda do not bar hearsay).

citizenship upon capture or surrender to forestall interrogation and to impose massive administrative burdens on battlefield soldiers, the military in general, and indeed our civilian judicial system as well. Nothing in the Constitution, this Court's precedents, or the laws of war requires the Court to hamstring our military effectiveness in such a manner.

CONCLUSION

Petitioners essentially ask this Court to decide their case while wearing blinders. They ignore the fundamental differences between an enemy combatant captured on a foreign battlefield, on one hand, and criminal defendants and loyal citizens interned for no reason other than their race, on the other. They disregard the magnitude of the threat posed to the nation's security from judicial second-guessing of the military's battlefield decisions and subsequent Executive determinations. They overlook the inherent reassurance provided by the fact that Hamdi was captured on a foreign battlefield, and that the determination to detain him was made by professional soldiers. And, ultimately, they fail to recognize that the fundamental protections of due process are robust enough to safeguard liberty when judicial intervention is necessary to prevent governmental oppression, but flexible enough to permit the government wide latitude when, as here, the risks of such oppression are minimal and the benefits of vigorous government action so great. After all, as the Founders knew, "[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union." THE FEDERALIST NO. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961). And so the Constitution was established, among other objects, to "provide for the common defence," as part of an enterprise to "secure," not impede, the "Blessings of Liberty." U.S. CONST. pmbl.

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

ADAM H. CHARNES
Counsel of Record
JAMES J. HEFFERAN, JR.
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

Counsel for Amicus Curiae

March 29, 2004

APPENDIX A

The following is a list of selected members of Citizens for the Common Defence:

Bradford A. Berenson
Richard D. Bernstein
Robert Bork
Adam H. Charnes
Miguel A. Estrada
David Frum
Eric George
Ed R. Haden
Charles C. Hwang
Wendy Keefer
Richard Klingler
Kris W. Kobach
Eugene Kontorovich
Christopher Landau
Kevin P. Martin
Christopher D. Moore
Stephen J. Murphy, III
Ryan D. Nelson
John Osborn
Christopher Oprison
Mathew Rosengart
Eugene Volokh
John Yoo

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No. 03-6696

In The

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YASER ESAM HAMDI, *et al.*,

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v.

DONALD RUMSFELD, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

OFFICE OF THE CLERK
MAR 29 2004
Supreme Court, U.S.
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QUESTIONS PRESENTED

1. Whether the Citizenship Clause of the Fourteenth Amendment *requires* (as opposed to merely *permits*) treating as citizens individuals born to foreign nationals who were temporarily visiting the United States at the time of the individual's birth?
2. Whether the clear intent of the framers who adopted and the people who ratified the "subject to the jurisdiction thereof" phrase of the Fourteenth Amendment to the United States Constitution should prevail in, or at least guide, the interpretation the Citizenship Clause?

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No. 03-6696

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Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Respondents

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principle, at issue in this case, that the ability of a people to decide upon whom to confer the benefits of citizenship is among the core attributes of sovereignty. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. In March 2003, the Institute sponsored a major conference entitled "American Citizenship in the Age of Multicultural Immigration," which will soon yield a book of the same title, and its affiliated scholars have published a number of other books, articles and monographs of particular relevance here, including Thomas G. West, *Immigration and the Moral Conditions of Citizenship*, in THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997); Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in RONALD J. PESTRITTO AND THOMAS G. WEST, THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 163-97 (2003); and THOMAS KRANNAWITTER, AN INTRODUCTION TO CITIZENSHIP FOR NEW AMERICANS (2002).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several other cases of constitutional import, including *Elk Grove Unified School District v. Newdow*, No. 02-1624; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

At 4:05 p.m. on the afternoon of September 26, 1980—day 327 of the Iranian hostage crisis—Nadiah Hussen Hamdi, born Nadia Hussen Fattah in Taif, Saudi Arabia, gave birth to a son, Yaser Esam Hamdi, at the Women's

Hospital in Baton Rouge, Louisiana. Mention is made of the Iranian hostage crisis because Yaser Esam Hamdi's parents might just as easily have been citizens of Iran, then in a hostile stand-off with the United States, as of Saudi Arabia. The boy's father, Esam Fouad Hamdi, a native of Mecca, Saudi Arabia and still a Saudi citizen, was residing at the time in Baton Rouge on a temporary visa to work as a chemical engineer on a project for Exxon.[2] While the boy was still a toddler, the Hamdi family returned to its native Saudi Arabia, and for the next twenty years Yaser Esam Hamdi would not set foot again on American soil.[3]

Yaser Esam Hamdi's path after coming of age would instead take him to the hills of Afghanistan, to take up with the Taliban (and perhaps the al Qaeda terrorist organization it harbored) in its war against the forces of the Northern Alliance and, ultimately, against the armed forces of the United States as well.[4] In late 2001, during a battle near Konduz, Afghanistan between Northern Alliance forces and the Taliban unit in which Hamdi was serving and while armed with a Kalishnikov AK-47 military assault rifle, Hamdi surrendered to the Northern Alliance forces and was taken by them to a

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[2] Certificate of Live Birth, Birth No. 117-1980-058-00393, on file in the Vital Records Registry of the State of Louisiana and available on-line at http://news.findlaw.com/cnn/docs/terrorism/hamdi92680birthc.pdf (last visited March 20, 2003); Frances Stead Sellers, *A Citizen on Paper Has No Weight*, Wash. Post B1 (Jan. 19, 2003).

[3] Sellers, *supra* n. 2, at B1.

[4] The armed forces of the United States had been ordered to Afghanistan by President Bush, acting pursuant to his powers as Commander in Chief, U.S. Const. Art. II, and an explicit Congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), against the "nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks [against the United States on September 11, 2001] or harbored such organizations or persons."

military prison in Mazar-e-Sharif, Afghanistan. Brief of the United States at 3, 6, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). From there Hamdi was transferred to Sheberghan, Afghanistan, where he was questioned by a U.S. interrogation team, determined to be an enemy combatant, and eventually transferred to U.S. control, first in Kandahar, Afghanistan and then at the U.S. Naval Base in Guantanamo Bay, Cuba. *Id.*, at 6-7.

Unlike his fellow enemy combatants being detained in Guantanamo Bay, Hamdi had a get-out-of-Cuba-free card. When U.S. officials learned that Hamdi had been born in Louisiana, they transferred him to the Naval Brig in Norfolk, Virginia, *id.*, from where, under the auspices of his father acting as his next-friend, has waged this legal battle seeking access to attorneys and a writ of habeas corpus compelling his release. This, because under the generally-accepted though erroneous interpretation of the Fourteenth Amendment's Citizenship Clause, Hamdi claimed that his birth to Saudi parents who were at the time temporarily visiting one of the United States made him a U.S. citizen, entitled to the full panoply of rights that the U.S. Constitution guarantees to U.S. citizens.

SUMMARY OF ARGUMENT

The current understanding of the Citizenship Clause is incorrect, as a matter of text, historical practice, and political theory. As an original matter, mere birth on U.S. soil was insufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization.

Although this correct understanding of the text of the Citizenship Clause was adopted by this Court, first in *dicta* and then as holding, it was later repudiated in the case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), in which this Court adopted instead an erroneous interpretation that is simply incompatible with the foundational principle of "consent of the governed."

While Congress remains free to offer citizenship to persons who have no constitutional entitlement to citizenship, it has not gone beyond the constitutional command in the context of birth citizenship. Mere birth to foreign nationals who happen to be visiting the United States at the time, as was the case of Hamdi, is not sufficient for constitutionally-compelled citizenship. Because this Court's rulings to the contrary rested on a flawed understanding of the Citizenship Clause, those rulings should be revisited. Moreover, the statutory grant of citizenship conferred by Congress, which precisely tracks the language of the Fourteenth Amendment, should itself be re-interpreted in accord with the original understanding of the Citizenship Clause. In the wake of the devastating events of September 11, 2001, now would be a good time to do so.

ARGUMENT

I. The Text of the Citizenship Clause Requires *Both* Birth In United States Territory *and* Jurisdictional Allegiance to the United States In Order For One To Have a Constitutional Right to Citizenship.

It is today routinely believed that under the Citizenship Clause of the Fourteenth Amendment, mere birth on U.S. soil is sufficient to obtain U.S. citizenship. As Professor Michael Dorf noted in August 2002, for example: "Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is *therefore* a citizen of the United States, even though he spent most of his life outside

this country." Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is An Enemy Combatant?* FindLaw (Aug. 21, 2002) (emphasis added).[5]

However strong this commonly-believed interpretation might appear, it simply does not comport with the text of the Citizenship Clause (particularly as informed by the debate surrounding its adoption).

The Citizenship Clause of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. Amend. XIV, § 1. As manifest by the conjunctive "and," the clause mandates citizenship to those who meet *both* of the constitutional prerequisites: 1) birth (or naturalization) in the United States; *and* 2) being subject to the jurisdiction of the United States.

As noted above, Hamdi was indisputably born in the United States, so the issue in this case is whether he was *also* at the time subject to the jurisdiction of the United States. The widely-held, though erroneous, view today is that he clearly was. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have *subjected* himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the Unites States and entitled to full citizenship as a result, or so the common reasoning goes.

Textually, such an interpretation is manifestly erroneous, for it renders the entire "subject to the jurisdiction" clause redundant. Anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdiction" of the United States. Yet it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results. *See, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) ("this Court will avoid a reading which renders some words altogether redundant"); *see also* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 (1989).

[5] Available at http://writ.corporate.findlaw.com/dorf/20020821.html.

The "subject to the jurisdiction" provision must therefore require something in addition to mere birth on U.S. soil. The language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment was derived, provides the key to its meaning. The 1866 Act provides: "All persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27, ch. 31 (April 9, 1866). As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child's parents remained a citizen or subject of the parents' home country, was not entitled to claim the birthright citizenship provided by the 1866 Act.

The jurisdiction clause of the Fourteenth Amendment is somewhat different from the jurisdiction clause of the 1866 Act, of course. The positively-phrased "subject to the jurisdiction" of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, one more in line with the modern understanding accepted unquestioningly by Professor Dorf and others that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading.

When pressed about whether Indians living on reservations would be covered by the clause since they were "most clearly subject to our jurisdiction, both civil and military," for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction; "[n]ot owing allegiance to anybody else." Congressional Globe, 39th Cong., 1st Sess., 2893 (May 30, 1866). And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (*i.e.*, under the 1866 Act). *Id.*, at 2890. That meant that the children of Indians who still "belong[ed] to a tribal relation" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin explicitly to exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant. *Id.*, at 2892-97; *see also* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 72-89 (1985).

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by this Court—by both the majority and the dissenting justices--in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). The majority in that case correctly noted that the "main purpose" of the Clause "was to establish the citizenship of the negro," and that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, *and citizens or subjects of foreign States born within the United States*." *Id.*, at 73 (emphasis added). Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the United States and the state in which they resided, provided they were not at the time subjects of any foreign power. *Id.*, at 92-93 (Field, J., dissenting).

Although the statement by the majority in *Slaughter-House* was *dicta*, the position regarding the "subject to the jurisdiction" language advanced there was subsequently adopted as holding by this Court in *Elk v. Wilkins*, 112 U.S. 94 (1884). John Elk was born on an Indian reservation and subsequently moved to non-reservation U.S. territory, renounced his former tribal allegiance, and claimed U.S. citizenship by virtue of the Citizenship Clause. This Court held that the claimant was not "subject to the jurisdiction" of the United States at birth, which required that he be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." *Id.*, at 102. Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court. *Id.*, at 99.

Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more "born in the United

> States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

Id., at 102. Indeed, if anything, American Indians, as members of tribes that were themselves dependant upon the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected even that claim, and in the process necessarily rejected the claim that the phrase, "subject to the jurisdiction" of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by this Court, and it was the correct interpretation. As Thomas Cooley noted in his treatise, "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government." THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN AMERICA 243 (2001) (1880).

II. The Overly-Broad Reading of this Court's Decision in *Won Kim Ark* Needs to be Narrowed to Conform to the Original Understanding of the Citizenship Clause.

Despite the clear holding of *Elk* and the persuasive *dicta* from *Slaughter-House* that mere birth on U.S. soil is not sufficient to meet the constitutional prerequisites for birthright

citizenship, this Court held otherwise in *United States v. Won Kim Ark*, 169 U.S. 649 (1898), with expansive language even more broad than the holding of the case itself. It is that erroneous interpretation of the Citizenship Clause, adopted thirty years after the adoption of the Fourteenth Amendment, that has colored basic questions of citizenship ever since.

In *Won Kim Ark*, Justice Horace Gray, writing for the Court, held that "a child born in the United States, of parents of Chinese descent, who at the time of his birth were subjects of the emperor of China, but have a permanent domicile and residence in the United States," was, merely by virtue of his birth in the United States, a citizen of the United States as a result of the Citizenship Clause of the Fourteenth Amendment. 169 U.S., at 653. Justice Gray correctly noted that the language to the contrary in *The Slaughter-House Cases* was merely *dicta* and therefore not binding precedent. *Id.*, at 678. He found the *Slaughter-House dicta* unpersuasive because of a subsequent decision, in which the author of the majority opinion in *Slaughter-House* had concurred, holding that foreign consuls (unlike ambassadors) were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." *Id.*, at 679 (citing, *e.g.*, *In re Baiz*, 135 U.S. 403, 424 (1890)).

Justice Gray appears not to have appreciated the distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of that sovereign's laws, and complete political jurisdiction, which requires allegiance to the sovereign as well.

More troubling than his rejection of the persuasive *dicta* from *Slaughter-House*, though, was the fact that Justice Gray also repudiated the actual holding in *Elk*, which he himself had authored. After quoting extensively from the opinion in *Elk*, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were

no more "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply held, without any analysis, that *Elk* "concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country." *Id.*, at 681-82.

By limiting the "subject to the jurisdiction" clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial level) subject to its laws merely by virtue of their residence in the United States as the result of long-established international law fiction of extra-territorality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction, on the one hand, and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified, on the other.

Justice Gray's failure even to address, much less appreciate, the distinction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between the two sorts of allegiance—"the one, natural and perpetual; the other, local and temporary." *Id.*, at 710. The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He noted that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment. *Id.*, at

707; *see also* Edward J. Erler, *Immigration and Citizenship: Illegal Immigrants, Social Justice and the Welfare State*, in GERALD FROST, ED., LOYALTY MISPLACED: MISDIRECTED VIRTUE AND SOCIAL DISINTEGRATION 71, 81 (1997).

Quite apart from the fact that Justice Fuller's dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray's broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that "a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason.*" *Id.*, at 693. And he necessarily had to recognize dual citizenship as a necessary implication of his position, *id.*, at 691, despite the fact that ever since the Naturalization Act of 1795, "applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects." *Id.*, at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20).

Finally, Justice Gray's position is incompatible with the notion of consent that underlay the sovereign's power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent.

Justice Gray stated that the children of only two classes of foreigner nationals were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extra-territorality, were not even considered subject to the territorial jurisdiction of the United States. Second

were the children of members of invading armies who were born on U.S. soil while it was occupied by the foreign army. But apart from these two narrow exceptions, all children of foreign nationals who managed to be born on U.S. soil were, in Justice Gray's formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a student or work visa, such as Hamdi's parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visas would likewise become U.S. citizens, even though born of parents who were now in the United States illegally. And, perhaps most troubling from the "consent" rationale, even children of parents who never were in the United States legally would become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in its territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

Although hard to sustain under the broad language used by Justice Gray, the actual holding of *Wong Kim Ark* is actually much more narrow, and the case need not be read so expansively as to produce such absurd results. Because of the

Chinese Exclusion Acts, *e.g.*, 22 Stat. 58 (1882), Wong Kim Ark's parents were ineligible for citizenship *even if* they had renounced their Chinese citizenship and subjected themselves to the exclusive jurisdiction of the United States. As such, Wong Kim Ark arguably would have been entitled to citizenship because, like his parents, he would in fact have been "subject to the jurisdiction" of the United States in the complete, allegiance-obliging sense intended by the phrase. *Cf. In re Look Tin Sing*, 21 F. 905, 907 (C.C. Cal. 1884) (Field, Circuit Justice) (concluding that the American-born son of Chinese immigrants, who had taken up permanent residence in the United States pursuant to a treaty with China that recognized the right of man to change his home and allegiance as "inherent and inalienable," because he, like his parents, was at the time of his birth subject to the "exclusive" jurisdiction of the United States).

Hamdi's parents, on the other hand, did not suffer from the legal disability that made Wong Kim Ark's parents ineligible for citizenship. No law barred them from applying for citizenship, and they did not manifest any intent to become permanent residents of the United States. They were, instead, merely temporary visitors to the United States, subject to the territorial jurisdiction and laws of the United States for the extent of their stay but not owing to the United States any other, much less exclusive, allegiance.

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. *See* U.S. Const. Art. I, § 8, cl. 4 ("The Congress shall have power ... To establish a uniform Rule of Naturalization"). But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone "born in the United States, *and subject to the jurisdiction thereof*," is a citizen. 8 U.S.C. § 1401(a). Indeed, Congress has by its own actions with respect to Native Americans—

both before and after this Court's decision in *Wong Kim Ark*—rejected the claim that the Citizenship Clause itself confers citizenship merely by accident of birth. *See* Act of July 15, 1870, 16 Stat. 361, ch. 296, § 10 (cited in *Elk*, 112 U.S., at 104) (extending the jurisdiction of the United States to any member of the Winnebago Tribe who desired to become a citizen); Act of March 3, 1873, 17 Stat. 632, ch. 332, § 3 (cited in *Elk*, 112 U.S., at 104) (same offer of citizenship to members of the Miami tribe of Kansas); Indian Citizenship Act of 1924, 43 Stat. 253, 8 U.S.C. § 1401(b) (granting citizenship to Indians born within the territorial limits of the United States). None of these citizenship acts would have been necessary—indeed, all would have been redundant—under the expansive view of the Citizenship Clause propounded by Justice Gray.

With the absurdity of Hamdi's claim of citizenship so vividly presented, it is time for this Court to revisit Justice Gray's erroneous interpretation of the Citizenship Clause, restoring the constitutional mandate to what its drafters and ratifiers actually intended—that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented when they ratified the Fourteenth Amendment.

III. The Overly-Broad Reading That Has Been Given to *Wong Kim Ark* Is Incompatible with the Theory of Government by Consent Adopted by the Founders and Reaffirmed by the Framers of the Fourteenth Amendment.

Once one considers the full import of Justice Gray's language in *Wong Kim Ark*, it becomes clear that his proposition is simply incompatible not only with the text of the Citizenship Clause but with the political theory of the American founding as well.

At its core, as articulated by Thomas Jefferson in the Declaration of Independence, that political theory posits the following: Governments are instituted among particular peoples, comprised of naturally-equal human beings, to secure for themselves certain unalienable rights. Such governments, in order to be legitimate, must be grounded in the consent of the governed—a necessary corollary to the self-evident proposition of equality. Decl. of Ind. ¶ 2. This consent must be present, either explicitly or tacitly, not just in the formation of the government but in the ongoing decision whether to embrace others within the social compact of the particular people. As formulated in the Massachusetts Bill of Rights of 1780:

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights .... The body-politic is formed by a voluntary association of individuals; it is a social compact by which *the whole people covenants with each citizen and each citizen with the whole people* that all shall be governed by certain laws for the common good.

Mass. Const. of 1780, Preamble (emphasis added). Thus, as Professor Edward Erler has noted:

> [T]he social contract requires *reciprocal consent*. Not only must the individual consent to be governed, but he must also be accepted by the community as a whole. If all persons born within the geographical limits of the United States are to be counted citizens—even those whose parents are in the United States illegally—then this would be tantamount to the conferral of citizenship without the consent of 'the whole people.

Erler, *Immigration and Citizenship*, at 77; *see also* THOMAS G. WEST, VINDICATING THE FOUNDERS, at 166-67. In other words, birthright citizenship—the claim advanced by Hamdi that he is entitled to citizenship status merely by accident of birth—is contrary to the principle of consent that is one of the bedrock principles of the American regime.

Such a claim of birthright citizenship traces its roots not to the republicanism of the American founding, grounded as it was in the consent of the governed, but to the feudalism of medieval England, grounded in the notion that a subject owed perpetual allegiance and fealty to his sovereign. *See id.*, at 81. A necessary corollary of the feudal notion of citizenship was the ban on expatriation, embraced by England and described by Blackstone as follows:

> Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection .... Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, canceled, or altered, by any change of time, place, or circumstance.... For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was instrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrence act of that prince to whom it was first due.

William Blackstone, 1 Commentaries on the Laws of England 357-58 (1979) (1765).

Thus, when Congress passed as a companion to the Fourteenth Amendment the Expatriation Act of 1868, which provided simply that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment

of the rights of life, liberty, and the pursuit of happiness," it necessarily rejected the feudal birth-right citizenship doctrine of medieval England, advanced here by Hamdi, as fundamentally incompatible with the principles of the Declaration of Independence. As Representative Woodward of Pennsylvania noted on the floor of the House of Representatives: "It is high time that feudalism were driven from our shores and eliminated from our law, and now is the time to declare it." Cong.-Globe, 40th Cong., 2nd Sess., at 868 (1868); *see also id.*, at 967 (Rep. Baily) (describing birth-right citizenship as "the slavish feudal doctrine of perpetual allegiance"); *Wong Kim Ark*, 169 U.S., at 707 (Fuller, J., dissenting) (describing the rule adopted by the majority as "the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liege men to their liege lord").

Such remnants of feudalism were rejected by our nation's founders, when they declared to a candid world that they no longer owed allegiance to the king of their birth. They were rejected again by the Congress in 1866, and by the nation when it ratified the Fourteenth Amendment. Hamdi's case presents this Court with the opportunity to reject them once and for all, and to repudiate the erroneous decision of *Wong Kim Ark* that revived that forgotten doctrine to the detriment of the American republican ideal of government by consent.

CONCLUSION

The decision of the Fourth Circuit should be affirmed, and this Court should correct the erroneous and overly-broad interpretation of the Citizenship Clause provided in *Wong Kim Ark*.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

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(30)

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In The

Supreme Court of the United States

YASER ESAM HAMDI and
ESAM FOUAD HAMDI, as
Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD,
Secretary of Defense, et al.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICUS CURIAE* CHARLES B. GITTINGS JR. IN SUPPORT OF PETITIONERS

DONALD G. REHKOPF, JR.
Counsel of Record
LAW OFFICE OF BRENNA & BRENNA, PLLC
31 East Main Street, Suite 2000
Rochester, New York 14614
585-454-2000 x12

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INTEREST OF *AMICUS CURIAE*

May it please this Honorable Court, now comes Charles B. Gittings Jr., *pro se*, who appears as *amicus curiae* under Rule 37.3(a) by written consent of both parties.[1]

My interest here is that of a U.S. citizen who is deeply concerned about the issues in this case and has no financial or personal stake in it. When the President issued the "Military Order" of 11/13/2001,[2] I resolved to oppose it in the belief the order was illegal, irresponsible, and dangerous. Since then I have worked full-time on the issues of that order (including the legal cases of Hamdi and the other detainees) for over two years.

The only purpose of my effort is to uphold the laws of the United States. I have made a diligent effort to understand both the facts and the law of this case, and have read and understand the rules of the court.

SUMMARY OF ARGUMENT

This brief will show that the Geneva Conventions are binding on the United States, and that the ruling of the court below that the treaties were, in essence,

[1] Counsel for both parties have granted written consent to this brief and filed copies with the Clerk. No counsel for a party in this case authored this brief in whole or in part. All costs of this brief were paid by *amicus* at his own expense.

[2] Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 F.R. 57833 (Nov. 16, 2001).

unenforceable because they are not "self-executing," was incorrect. The contention here is that the conventions are in fact self-executing and that the reasoning of the court below was unsound, but that even if they were correct about the conventions not being "self-executing," there is other law which explicitly executes the conventions as law for the United States.

Having established that the Geneva Conventions are in force, the brief then turns to their requirements, shows that Hamdi has been denied the protection of his rights in violation of the law, and concludes that the opinion below should be reversed and the case remanded to the district level for a full review of Hamdi's rights.

ARGUMENT

1. General Principles

In advance of the brief, *amicus* stands FOR *habeas* as a natural and universal right; FOR the primacy of our laws and our Congress with respect to military affairs; and FOR the principles of the U.N. Universal Declaration of Human Rights. Those matters have been ably addressed by a distinguished and admirable array of *amici* in this and related cases, and will not be addressed here except where they bear directly.

This brief stands FOR the Geneva Conventions of August 12, 1949, and asserts, *contra* the opinion of the court below, that they have full force in the laws of the United States. (Geneva Conventions I-IV (1949), hereinafter "Geneva" collectively; see TOA for citations. The third convention, hereinafter "GPW," protects POWs; the fourth,

hereinafter "GC," protects civilians. The first two protect wounded and medical personnel over and above the basic protections of GPW and GC and are not relevant here. The first three articles of each convention are identical and are known as Common Articles 1-3, hereinafter CA1-3. There are 190 nations party to Geneva.)

2. The Fourth Circuit *contra* Geneva

In the proceedings below, Hamdi asserted that his detention was unlawful because he had been denied POW status and a fair hearing on the question of his status in violation of GPW arts. 4 and 5. The court below rejected that claim:

> "This argument falters also because [GPW] is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). [GPW] evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations." *Hamdi v. Rumsfeld (III)*, 316 F.3d 450 (4th Cir. 2003), 480-481.

That ruling is incorrect on a number of grounds. First, as other *amici* and authorities have shown, Geneva is in fact either self-executing or effectively so;[3] and while not

[3] See for example: Brief of *Amici Curiae* Former Prisoners of War, *et al.*, in Support of Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696, On

(Continued on following page)

binding as precedent for the Fourth Circuit, *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fl. 1992), was a case of national import that gives a well-reasoned analysis on that point, *Id.* at 797-799. Second, the true intent of Geneva is plainly expressed by CA1, which requires all parties "to respect and to ensure respect for [Geneva] in all circumstances." Third, CA3 applies Geneva to any "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," and it cannot be supposed that diplomatic enforcement was anticipated in a non-international conflict. Fourth, Geneva requires all parties to enforce the conventions by both administrative and judicial means: GPW art. 129 and GC art. 146 require each party to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach'] of [Geneva]," to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts," and to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches."

Clearly, the primary means of enforcement envisioned by Geneva is not diplomacy as the court below would have it, but criminal sanctions imposed by the domestic laws of

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Pet. for *Cert.*, *passim* (12/3/2003); and Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, section III. A. *The Applicability of International Law as Law of the United States*, 44 Harv. Int'l L.J. 503, 514-517 (2003).

' Grave breaches are defined in GPW art. 130 and GC art. 147.

the parties acting under the positive obligation of CA1 to "to respect and to ensure respect for [Geneva] in all circumstances." Just as clearly, the United States stated in no uncertain terms during the invasion of Iraq that it expected Iraqi forces to obey Geneva to the letter, yet here the court below has seen fit to ignore Geneva entirely on the doctrinal ground that it is not "self-executing." *Amicus* believes them mistaken, but even if they were correct on that point, there is other law which renders the question moot and their conclusion incorrect.

3. Execution of Geneva under *Foster v. Neilson*

GPW art. 129 and GC art. 146 require all parties to enforce Geneva, and each occurs in Part IV of the two conventions, entitled "Execution of the Convention." The doctrine on "self-executing" treaties applied by the court below to Geneva derives ultimately from *Foster v. Neilson*, 27 U.S. 253, 314-15 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833), and was established by Chief Justice Marshall, writing for the court:

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the Court." *Id.* at 314.

Hence, if Geneva is not self-executing, the legislature must act to execute it. As shown in the preceding section, the court below appears to have been so eager to deny Hamdi any private right of action that they largely ignored what Geneva actually requires. Considered in terms of what Foster requires, Geneva has only one significant provision requiring legislation, namely the requirement in GPW art. 129 and GC art. 146 that all parties "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any [grave breach] of [Geneva]." Note the language "any . . . necessary"; in practice, it has long been U.S. policy that no special legislation was required. Be that as it may, having reached the conclusion that Geneva was not "self-executing," the court below failed to ask: what exactly would be needed to execute Geneva, and what if any action has Congress taken in that regard?

Had they asked those questions, the answer was obvious: **18 U.S.C. § 2441**, "*The War Crimes Act of 1996*," H.R. 104-698 (1996), as amended by "*The Expanded War Crimes Act of 1997*," H.R. 105-204 (1997), which clearly executes Geneva in exactly the sense of *Foster*. This statute makes it a federal crime to commit any grave breach of Geneva, any violation of CA3, or any act prohibited by arts. 23, 25, 27 or 28 of the Annex to the Hague Convention IV (1907), Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 1 Bevans 631 (hereinafter, "HR" denotes the annex of regulations, "H.IV" the convention proper). The statute applies to anyone who commits a war crime "whether inside or outside the United States," whenever "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." It

is impossible for the ruling of the court below regarding Geneva to be reconciled with the plain meaning of this statute.

4. Geneva is Law for the United States

By the light of *Foster* and 18 U.S.C. § 2441 there can be no doubt that Geneva is the law of the United States. The United States is obligated to "respect and ensure respect for [Geneva] in all circumstances," CA1, and to prosecute any grave breach of Geneva, GPW art. 129, GC art. 146.

Further, there is no form of immunity for war crimes. GPW art. 131 and GC art. 148 state: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches]." The (London) Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945) (hereinafter "IMT"), which governed the Nuremberg trials, also speaks here: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility," IMT art. 7, and "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility," IMT art. 8. In regard to this principle, Justice Robert Jackson made some illuminating remarks in the preface to his report on the conference that negotiated the IMT:

> "The most serious disagreement, and one on which the United States declined to recede from its position even if it meant the failure of the Conference, concerned the definition of crimes.

> The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all."[5]

Geneva is our law by the direct exercise of fundamental constitutional powers by the Congress and President: Geneva was signed under Truman (1949), ratified with the advice and consent of the Senate by Eisenhower (1955), and explicitly executed (1996) and reinforced (1997) by acts of Congress under Clinton. Geneva may be "denounced" only by notification to the Swiss Confederation one year in advance, after which Geneva remains in force until the cessation of hostilities, including the repatriation of all prisoners, GPW art. 142, GC art. 158.

Geneva and Hague specifically codify the laws and customs of war, H.IV preamble, GPW art. 135, GC 154. The Constitution delegates the command of our armed forces to the President, but reserves to Congress the power to create, equip, and regulate such forces. U.S. Const., art. I, § 8, cl. 10-16, 18, U.S. Const., art. II, § 2, cl. 1. The

[5] Report of Robert H. Jackson, *International Conference on Military Trials: London, 1945*, Department of State Publication 3080, U.S. Govt. Print. Off., Washington, D.C. (1949), preface.

President "shall take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3, and the conduct of military operations by the U.S. has been governed by statute from the beginning.[6]

5. The Detention of Yaser Hamdi Violates 18 U.S.C. § 2441

Amicus does not dispute the government's authority to detain a suspected criminal or an enemy in war time, but all such detentions must conform to the law. As the parties and *amici* in this and other detainee cases have shown, the detention of Hamdi fails to comply with GPW arts. 4-5, *etc.*, and is therefore in violation of 10 U.S.C. § 897 and 18 U.S.C. § 4001.

Grave breaches of GPW are defined by GPW art. 130 and include: "wilfully causing great suffering or serious injury to body or health, * * * or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." Grave breaches of GC are defined by GC art. 147 and include: "wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, * * * or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention * * *."

If Hamdi is a combatant as alleged by the government, then depriving him of a fair hearing on the question

[6] See Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Law., November 2003, at 1, 2.

of POW status is a grave breach of GPW; if he is a civilian, his detention, deportation, and deprivation of due process are grave breaches of GC.[7] In either case, it appears that his detention, in conditions which are harsh even by the standards of a maximum security prison, inflicts great suffering.[8] Grave breaches of Geneva are violations of 18 U.S.C. § 2441(c)(1).

Any violation of CA3 is prohibited by 18 U.S.C. § 2441(c)(3), which includes: "cruel treatment," CA3(a), "humiliating and degrading treatment," CA3(c), and "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," CA3(d). The parties and other *amici* explore these particulars at great length. The point here is that detention and legal process in an armed conflict must conform to Geneva, and serious violations are war crimes punishable under 18 U.S.C. § 2441.

Finally, 18 U.S.C. § 2441(c)(2) defines as a war crime any conduct prohibited by arts. 23, 25, 27, or 28 of HR. Regarding due process, HR art. 23 states in significant part: "In addition to the prohibitions provided by special Conventions, it is especially forbidden ... [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." The court below went to extreme lengths to deny Hamdi

[7] See Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, Army Law., November 2003, at 18, 21-29.

[8] See Paust, *supra*, 530-531.

any meaningful protection of his rights, and unless he has absolutely no rights at all, their decisions were not merely incorrect, they were violations of 18 U.S.C. § 2441.[9]

CONCLUSION

There is nothing appropriate about evading or violating the law, nor anything necessary in abusing a prisoner who is *hors de combat*. There is nothing new here: the value of intelligence and the infliction of atrocities on ones enemies are as old as war itself. The President might plausibly suppose there was some advantage to be had by roasting a few of these "detainees" alive over an open fire, thinking it might lead others to cooperate – such "time-honored" practices are as common in history as wars are. Would the Fourth Circuit defer to that as well? And if not, why not? Are we to understand that some of our laws are better than others, and our judges and elected officials are at liberty to choose which to obey according to their personal sensibilities?

The government has gone to great lengths to avoid any accountability to the law here, and all their arguments reduce to a single theme: that in a war the President may do whatever he pleases as long as the Congress is willing to go along with him. But the Congress is not the Roman Senate, the President is not a Roman *Imperator*, and it is precisely this sort of arbitrary and absolute exercise of power unrestrained by the rule of law that our

[9] See also Wallach, *supra*, 42-47.

Constitution, our laws, and the Geneva Conventions are intended to prohibit and prevent.

The Geneva Conventions ARE the law of war, and they ARE the law of the United States. Their only purpose is to protect both combatants and civilians in order to ameliorate suffering in war. No just resolution of this or any other detainee case is possible without strictly observing the requirements of the Geneva Conventions and 18 U.S.C. § 2441. The decision of the court below should be reversed and the case of Yaser Hamdi remanded to the U.S. District Court for Eastern Virginia for a thorough and searching review of his rights.

Respectfully submitted,

DONALD G. REHKOPF, JR.
Counsel of Record
LAW OFFICE OF BRENNA &
BRENNA, PLLC
31 East Main Street, Suite 2000
Rochester, New York 14614
585-454-2000 x12

Charles B. Gittings Jr.
pro se
770 Kingston Ave. #304
Oakland, CA 94611
510-923-1688

In memoriam
Elias T. "Lile" Jacks (1924-1973)

Revision Notes – This brief was filed February 23, 2004, by GITTINGS, *pro se*, whereupon the Office of the Clerk declined to docket the brief without a member of the Bar of the Court appearing as Counsel of Record per Rule 9. Their reasons remain unclear, but the matter was resolved on March 18, 2004, when MR. REHKOPF notified the Clerk and parties that absent objections, he was willing to appear as Counsel of Record *pro bono publico*, the Court approving. Labels were then submitted to modify the cover and last page of each copy of the brief to reflect the change.

This PDF has the original text with the information for Mr. Rehkopf added. I am very grateful for his generous and timely assistance.

Charles B. Gittings Jr.
March 30, 2004